IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-753

SENATOR EARL W. BRYDGES, as Majority Leader and President Pro Tem of the New York State Senate,

Appellant,

—against—

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERT ADAMS, BERNARD BACKER, ALGERNON D. BLACK, THEODORE BROOKS, HERSCHEL CHANIN, NAOMI A. COWEN, ROBERT B. ESSEX, FLORENCE FLAST, REBECCA GOLDBLUM, BENJAMIN HAIBLUM, MARTHA LATIES, BLANCHE LEWIS, ELLEN A. MEYER, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, ALBERT SHANKER, HOWARD M. SQUADRON and CHARLES H. SUMNER,

Appellees.

On Appeal from the United States District Court for the Southern District of New York

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JURISDICTIONAL STATEMENT ON BEHALF OF APPELLANT, SENATOR EARL W. BRYDGES

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JURISDICTIONAL STATEMENT ON BEHALF OF APPELLANT, SENATOR EARL W. BRYDGES

Appellant, Senator Earl W. Brydges, as Majority Leader and President Pro Tem of the New York State Senate, appeals from so much of the judgment of the United States District Court for the Southern District of New York, entered on October 20, 1972, as declares that Sections 1 and 2 of Chapter 414 of the 1972 Laws of New York State violate the Establishment Clause of the First Amendment to the Constitution of the United States and permanently enjoins payments under said sections to poverty area nonpublic elementary and secondary schools for health, safety and welfare purposes or to the parents of low income nonpublic school children in payment for or in reimbursement of any tuition payments made by them to nonpublic elementary and secondary schools, and submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinion Below

The decision of the District Court for the Southern District of New York on the motion to convene a three-judge District Court was granted on consent of all parties on June 20, 1972 and no opinion was written.

The opinion of the District Court enjoining payments under Sections 1 and 2 of Chapter 414 of the 1972 Laws of New York State was rendered on October 2, 1972 and is not as yet officially reported. It is attached hereto as Appendix A.

Jurisdiction

This suit was brought under 28 U.S.C. §§ 1331, 1343(3), 2281, 2283 and 2202 for a permanent injunction against the allocation of funds of the State of New York to

poverty area nonpublic schools for a portion of expenses incurred for compliance with State-promulgated health and safety maintenance standards and to parents of low income nonpublic school children in payment for or in reimbursement of tuition payments made to such schools. The judgment of the District Court was entered on October 20, 1972 (Appendix B hereto), and notice of appeal of Senator Earl W. Brydges, as intervenor-defendant in this action, was filed on November 17, 1972 (Appendix C hereto). The following most recent decisions sustain the jurisdiction of the Supreme Court to review judgment on direct appeal in this case: *Lemon* v. *Kurtzman, Earley* v. *DiCenso* and *Robinson* v. *DiCenso,* 403 U. S. 602 (1971), and *Tilton* v. *Richardson,* 403 U. S. 672 (1971); *Levitt, et al.* v. *Committee for Public Education and Religious Liberty, et al.,* Docket Nos. 72-269, 72-270, 72-271, October Term—1972.

Questions Presented

Is the "Establishment Clause" of the First Amendment of the U. S. Constitution violated by those provisions of a 1972 New York State Legislative Program, which specifically assist poor parents in educating their children: (A) by partially paying state moneys for insuring that the nonpublic school buildings in low income Title IV areas housing poor elementary and secondary school children comply with certain minimum state required health and safety maintenance standards; and (B) by partially reimbursing poor parents for secular tuition payments to continue their children in nonpublic schools, especially when there are not sufficient public funds and buildings to house these nonpublic school children for a quality education in the public schools?

Statutes Involved

Sections 1 and 2 of Chapter 414 of the 1972 Laws of New York State, entitled, in part, "An Act to amend the education law, in relation to health, welfare and safety grants for pupils in nonpublic schools; to establish an elementary and secondary education opportunity program of tuition reimbursement for parents of low income; . . ." which is set forth in Appendix D hereto.

Statement

Appellant, Senator Earl W. Brydges, is the Majority Leader and President Pro Tem of the New York State Senate.

On May 25, 1972, Appellees, allegedly taxpayers of New York State, instituted this suit in the United States District Court for the Southern District of New York, praying, *inter alia*, that defendants, Ewald B. Nyquist, Commissioner of Education, Arthur Levitt, Comptroller, and Norman Gallman, Commissioner of Taxation ad Finance, of the State of New York, be permanently enjoined from approving or paying any funds pursuant to Chapter 414 of the 1972 Laws of New York State (Appendix B hereto) to partially alleviate the financial burden on low income parents for educating their children in nonpublic schools.

Parents of children enrolled in nonpublic schools, namely, Geraldine M. Boylan, Priscilla L. Cherry, Joan M. Ducey, Nora H. Ferguson, Angelina M. Ferrarella, Ernest E. Roos, Jr. and Adamina Ruiz, were permitted to intervene as parties defendant. Similar permission was granted to Appellant, Senator Earl W. Brydges, Majority Leader and President Pro Tem of the New York State Senate.

On June 20, 1972, a three-judge District Court consisting of Hon. Paul R. Hays, U. S. Circuit Judge; Hon. John M. Cannella and Hon. Murray I. Gurfein, U. S. District Judges, was duly constituted, pursuant to 28 U.S.C. §2281 and §2284, on consent of all parties. A hearing on the merits was held on July 6, 1972.

On October 2, 1972, Judge Gurfein handed down an opinion (Appendix A hereto), concurred in by Judge Cannella and Hayes, declaring, *inter alia*, that Sections 1 and 2 of Chapter 414 of the 1972 Laws of New York State (Appendix B hereto) violate the Establishment Clause of the First Amendment. The Court, in striking down Section 1 which provides health, safety and welfare grants for nonpublic schools in economically impoverished areas, reasoned, in part, as follows:

> "In sum, we hold that, although we accept the intention of the legislation as being essentially secular and within the police power of the State, the effect of Section 1 of the statute in its present form is inevitably to advance religion. We hold, alternatively, that that Section creates a potentially excessive entanglement of the State with religion with potentially undesirable consequences to both."

In striking down Section 2 of Chapter 414, which provides for partial reimbursement to poor parents for the secular tuition they pay to send their children to nonpublic schools, the Court recognized the secular purposes of this program and observed as follows:

> "The essential reliance of the State in support of this part of the statute is twofold: (1) that the free exercise of religion is inhibited if the needy may not be subsidized with State funds to aid their 'right' to a parochial school education for their chil-

dren; and (2) that the State will gain economic benefit from supporting parochial schools, because otherwise the fiscal burden cast upon the State in the event of their unfortunate demise will be almost intolerable.

"These are serious arguments that cannot be disregarded particularly when made by a State Legisture, and we have given considerable thought to their meaning and implications, particularly in the light of our sympathy for the argument that in a pluralistic society it is a positive good to have a variety of educational institutions, not all public. As we have delved into the implications of these arguments we have become convinced, however, that, under our oath to defend the Constitution, we must hold that they fail.

"The argument based on the Free Exercise Clause has a superficial appeal. Why should a richer man have the right to practice his religion as he sees fit while a poor man cannot do so only because of his poor financial condition? Are we not a nation that abhors distinctions based on wealth, and have we not strained the fisc to equalize the condition of rich and poor before the law? Indeed, we have left partisanship behind in our common belief that equality, so far as it is possible to achieve, is a desirable goal for our society."

On October 20, 1972, judgment was entered (Appendix B hereto) permanently enjoining the

"payment for or reimbursement of any moneys heretofore or hereafter expended by nonpublic elementary and secondary schools for maintenance and repair"

and

> "payment for or reimbursement of any tuition payments heretofore or hereafter made to non-public elementary and secondary schools."

Notice of appeal on behalf of Appellant, Senator Earl W. Brydges, from the foregoing judgment to this Court was filed on November 17, 1972, pursuant to 28 U.S.C. §2101.

THE QUESTIONS ARE SUBSTANTIAL

I. The United States Constitution does not prevent the State from making educational appropriations benefiting poverty area and low income students in the nature of public welfare benefits.

The nonpublic school aid program presented here for consideration is unique in that it is different from any other statute in the United States. It is specifically designed to partially assist low income and poverty area parents in their desire to educate their children in nonpublic schools and it is limited in scope to certain clearly defined geographical poverty areas and certain clearly defined low income levels. The Final Report of the President's Panel on Nonpublic Education (U. S. Gov. Print. Office, Stock No. 1780-1972) observed:

> "Finally, it might be noted that some constitutional lawyers feel the time has come to challenge the denial of benefits to nonpublic school students on grounds that educational appropriations are public welfare benefits which should not be restricted by religious conditions. The challenge should be mounted."

The instant statute was drafted with just such an observation in mind and this case, limited as it is to poverty areas and low income parents, brings an educational public welfare benefit program before this Court.

A. Legislative History of Chapter 414—Fiscal Crisis in New York State:

New York State legislators, representing all political viewpoints, are concerned not only about the 3.2 million pupils enrolled in our public schools but also about the 750,000 pupils enrolled in the State accredited nonpublic schools, where children are required by law to receive a secular education equivalent to that in the public schools.

Article XI, Section 1 of the New York State Constitution charges the Legislature with the responsibility for ". . . the maintenance and support of a system of free common schools, wherein all the children of this State may be educated." For the past several years the State Legislature has been confronted with a crisis in financing the education of all its children. During this period approximately 4 million pupils have been in attendance yearly in the public and nonpublic schools of the State.

The cost to the State of financing public education has risen to about $2.5 billion in 1972-73, an increase of almost $500,000,000 since 1969-70, while local school district contributions increased by a commensurate amount.

Approximately 750,000 children, 18% of all students, are currently attending State chartered and regulated nonpublic schools at practically no cost to the taxpayer. Greatly increased costs for parents at these nonpublic schools, coupled with the ruinous inflation of recent years and ever rising taxes to support government operations at all levels including education, threaten a precipitous

collapse of the nonpublic school system with catastrophic consequences on the public sector.

Particularly affected are city school districts often charterized by overcrowded and outdated school buildings, unsatisfactory pupil-teacher ratios and hampered by constitutional tax limits in raising funds for education. Indeed, most of these school districts have little tax margin remaining. The table below demonstrates the relationship between remaining property tax leeway, the number of nonpublic school children and the local amount from their major source of revenue that would be available to support an influx of nonpublic students into the public schools.

PROPERTY TAX REVENUE REMAINING UNDER CONSTITUTIONAL LIMITS FOR THE SUPPORT OF EDUCATION IN SELECTED CITIES*

City	*1971-1972 Property Tax Margin Remaining*	*1970-1971 Nonpublic Enrollment*	*Amount available per pupil at local level if all nonpublic pupils were transferred to public schools*
burn	$ 254,122	1,709	$148.69
ghamton	175,826	2,505	70.19
ffalo	5,528,877	32,353	170.89
mestown	36,826	535	68.83
w York	1,400,187	399,615	3.50
agara Falls	1,118	3,430	.32
chester	2,835,858	14,986	189.23
racuse	3,798	9,640	.39
oy	896,628	3,325	269.66
ica	664,116	5,402	122.93
nkers	—0—	9,946	—0—

*Table and informational data in this subdivision 2 are derived from 1972 ... New York State Commission on the Quality Cost and Financing ... and Secondary Education, Chapter V—Aid to Nonpublic Schools.

The above city school districts have within their geographic boundaries more than 60% of all nonpublic school pupils in New York State. It is readily demonstrated from the above Table that the ability of those school districts to finance even the local share of education costs (average of $750 per pupil) would be well nigh impossible if these students should transfer in any substantial numbers. In fact, the Table demonstrates that even a small number of transfers in certain cities—New York City, Niagara Falls, Syracuse and Yonkers—could constitute financial disaster for those areas.

The average operating costs for each public school child in New York State is approximately $1400 per year. The financial crises that would be precipitated by attempting to maintain this present per pupil expenditure, should there be a collapse of nonpublic education, would be of shocking proportions. Consider, for example, the over $1 billion additional annual operating cost that would be necessary, and the estimated $1.4 billion added expenditure necessary to finance capital structures capable of handling this influx of children. The enormity of such a fiscal nightmare can only be placed in perspective when one considers that this is $600,000,000 more than the entire revenue currently generated by the New York State sales tax and would necessitate almost doubling the State income tax. Can a State which has balanced its current budget on *anticipated* Federal revenue sharing of $400,000,000 and whose tax burden is among the highest in the country be expected to meet this added fiscal burden? Should local school districts relying on a regressive property tax, already at the confiscatory level, be asked to assume that burden? The answer to the Legislature was obvious. Survival of quality education was at stake.

Most severely threatened were the inner city poverty area schools. This was the case because the parents of the children attending the nonpublic schools in these areas were either impoverished or of such low income standing that they were unable to contribute to the maintenance and operation of the nonpublic schools. Of particular significance was the additional fact that in these inner city areas the public schools were already undersized and overcrowded and incapable of accepting any further influx of students (cf., *Nebraska State Bd. of Educ., et al.* v. *School District of Hartington, etc.*, 188 Neb. 1 (1971), cert. den. Supreme Court Docket No. 71-1537 (October 16, 1972).

Thus the New York State Legislature responded, by overwhelming pluralities in both houses, with a program of aid to nonpublic schools in poverty areas and assistance to low income parents.

The law provides for a broad-based program to insure the quality of education of all children within the State during this period of extreme fiscal crises. It encompasses a multi-faceted aid program designed to insure the health, safety and welfare of children attending schools in impoverished areas; and a program of financial grants to parents of low income status, to enable all parents, not just the wealthy, to continue to educate their children in nonpublic schools and to avoid any precipitous school closings which would necessarily endanger the quality of education in the public schools.

B. Analysis of Sections 1 and 2 of Chapter 414.

(1) *Section 1—The Health, Safety and Welfare* Grants

To insure the health, safety and welfare of nonpublic school children, grants for maintenance and repair pro-

grams are provided for nonpublic schools in urban areas which serve high concentrations of students from low income families. These schools are designated by the U. S. Office of Education upon the recommendation of the New York Commissioner of Education and the local school superintendent pursuant to Title IV of the Federal Higher Education Act.

The basic grant is $30 per pupil, which is increased by $10 for children receiving instruction in school buildings over 25 years old. The grants, sent directly to the schools, are to be applied only for such health, safety and welfare purposes as heat, custodial services, ventilation, fire protection, lights, safety devices, etc. The schools must annually account for the proper expenditure of funds. In no event can the total payment to a nonpublic school for such services exceed one-half of the actual costs of such comparable services in the public schools. Approximately 280 nonpublic schools, of a total of 2,000 nonpublic schools, containing a total enrollment of 100,000 students will be eligible.

(2) *Section 2—Tuition Reimbursement for Low Income Parents*

The Court has long recognized the right of individual parents to select a school other than public for the education of their children (See, *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925). This right, however, is diminished or even denied to children of lower income families, whose parents, of all groups, have the least options in determining where their children are to be educated. This section would provide partial assistance in meeting the financial burden of low income families in supporting the compulsory education of their children who are full time students in New York nonpublic elementary and secondary schools.

The Act establishes an elementary and secondary education opportunity program which would provide direct reimbursement payments for children from low income families who attend nonpublic schools.

Eligible parents are those with net taxable incomes of under $5,000 a year. The payments, made directly to the parents, would amount to $50 per calendar year for each child in grade levels one through eight and $100 for children in grade levels nine through twelve. Payments would be reduced for months in which a child is not enrolled in the nonpublic school. The tuition reimbursement cannot exceed 50% of the actual tuition payments made by the parent.

A similar measure was recommended on April 20, 1972 for enactment on a Federal level by President Nixon's Panel on Nonpublic Education. (See, *Final Report of the President's Panel on Nonpublic Education,* supra.) The Panel is a sub-committee of the "blue ribbon" group of educators, lawyers and fiscal experts who constitute the President's Commission on School Finance.

C. Prior Decision of This Court Interpreting the "Establishment Clause":

Until *Everson* v. *Board of Education,* 330 U. S. 1 (1947) the prohibition of the "establishment clause", of the First Amendment as it applied to State action had not received this Court's review.

As a consequence, it is only necessary to review the limited number of recent Supreme Court decisions involving education aid programs to develop an outline of the kinds of meaningful aid to nonpublic education which have not been found to violate the First Amendment.

There are three principal decisions of this Court from which the constitutional limitations may be deduced.

In *Everson* v. *Board of Education*, supra, this Court sustained a state-financed program of bus transportation for students attending all schools including church-related. In its opinion this Court emphasized the public purpose which was being performed, saying:

> "It is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose." (*Everson*, 330 U. S. 1, 7).

Twenty years later in *Board of Education* v. *Allen*, 392 U. S. 236 (1968), this Court sustained a state-financed program of loan of secular textbooks to students in all schools, including those that are church-related. In the majority opinion, Justice White suggested some of the guidelines for judging constitutional permissibility of other programs, saying:

> "Thus, no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools." (*Allen*, 392 U. S. 236, 243).

The third decision to deal with the issue of education aid was *Lemon* v. *Kurtzman, et al.*, 403 U. S. 602 (1971) with its related cases of *Earley* v. *DiCenso*, and *Robinson* v. *DiCenso*, as well as *Tilton* v. *Richardson*, 403 U. S. 672 (1971).

Unlike the two prior decisions upholding aid, the *Lemon* decision, supra, held that programs to subsidize teachers' salaries in church related schools were unconstitutional.

Just as we have said that *Everson* and *Allen* were limited to permitting buses and textbooks, respectively, so

do we find that *Lemon* is limited to outlawing direct payment of teachers' salaries. These are the narrow court holdings for which we must account carefully in any analysis.

Lemon did not deal with other programs, yet unfashioned, which take the form of scholar awards, parent grants, vouchers, tuition grants, tax credits, tax deductions, or an educational public welfare program as herein presented.

The narrow decision in *Lemon* must not foreclose us from the consideration of other possible and permissible routes of programming. Certainly it is the task of the state legislatures with the guidance of this Court to evolve the boundaries of constitutional permissibility.

(1) *Secular Neutral or Nonideological Services, Facilities, or Materials:*

In the majority opinion in *Lemon,* Justice Burger suggests that there are significant areas of assistance which are permissible under the First Amendment. He states:

> "Our decisions from *Everson* to *Allen* have permitted the State to provide church-related schools with secular, neutral or nonideological services, facilities or materials." (*Lemon,* 403 U. S. 602 at 616 (1971)).

It is of special significance that Justice Burger paraphrases this language in *Tilton* v. *Richardson,* 403 U. S. 672 (1971), decided the same day, in which grants for building costs at church-related colleges were upheld. There this court said:

> "The entanglement between church and State is also lessened here by the nonideological character of the

aid which the government provides. Our cases from *Everson* to *Allen* have permitted church-related schools to receive government aid in the form of secular, neutral, or nonideological services, facilities or materials that are supplied to all students regardless of the affiliation of the school which they attend." (*Tilton*, 403 U. S. at 687).

It would appear that by this language this Court did not foreclose a program of limited aid to nonpublic schools in poverty areas in the nature of health, safety and welfare grants.

(2) *State Aid to the Student and His Parents—Not to the Church-Related School:*

The majority opinion in *Lemon* made a fundamental distinction between direct money grants and programs of so-called secular and neutral services, as are discussed above.

With respect to direct money grants this Court emphasized that payment to a church-related school was impermissible *where excessive entanglement was required.* In so stating, the Court went on to say:

> "This factor distinguishes both *Everson* and *Allen*, for in both those cases the Court was careful to point out that State aid was provided to the student and his parents—not to the church-related school." (403 U. S. at 621)

It was this criteria which was expressed by Mr. Justice White in *Allen, supra,* when he emphasized that in that case no funds or books were furnished to parochial schools, and the financial benefit provided is to the parents and children, and not to the schools.

Even Justice Douglas, who presented a strong dissent in the *Allen* case, seemed to concede the validity of child and parent benefit legislation when he stated:

> "There is nothing ideological about a school lunch, a public nurse, or a *scholarship.*" (390 U. S. 257, emphasis added)

A welfare benefit program of limited reimbursement to low-income parents would seem to avoid the excessive entanglement issue and be permissible in that the aid is "provided to the student and his parents—not to the church related school."

Thus, this Court has recognized that the First Amendment does not create an absolute prohibition against any form of State financial assistance to religious institutions. It is noted in *Lemon* v. *Kurtzman,* 403 U. S. 602 (1971) that rather than forming a "wall of separation" between Church and State, the First Amendment is a "blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship."

The Court observed:

> "Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable. . . . Fire inspections, building and zoning regulations, and state requirements under compulsory school attendance laws are examples of necessary and permissible contracts." (403 U. S. at 614)

D. Constitutionality of Health, Safety and Welfare Grants:

In the *Lemon* case this Court acknowledges that States do have a legitimate interest under their police powers to insure the health, safety and welfare of children in nonpublic schools.

In recognition of this permissible area of legislation, the New York State Legislature provided for grants in aid to nonpublic schools located within improverished areas. Notably, the children benefiting from such grants attend only schools where teachers, including teachers in nonpublic schools, are entitled to partial forgiveness of repayment of Federal educational loans. Such loan relief is afforded under Title IV of the Federal Higher Educational Act of 1965 to induce teachers to instruct in impoverished areas.

To insure that the State payments are applied solely for the health, safety and welfare of children attending such schools, an annual accounting is required. As additional assurance of the secularity of the program, in no event can the total payment to a nonpublic school for such services exceed one-half the actual costs of such comparable services in the public schools.

Significantly, no portion of such State grants can be applied towards teachers' salaries. Accordingly, no danger exists as to "excessive governmental entanglement" wherein the public sector might dictate the character of instruction in parochial schools. Certainly, this fear was a major reason for this Court's rejection of the Secular Educational Services Act, which subsidized teachers' salaries, in the *Lemon* case.

E. Constitutionality of Tuition Reimbursement Grants—Ohio and Pennsylvania Plans Distinguished:

Recent decisions have invalidated two state plans for providing tuition reimbursements to parents whose children attend nonpublic schools (*Wolman* v. *Essex,* 342 F. Supp. 399 (E. D. Ohio 1972), aff'd. 41 Law Week 3167 (10-10-72); *Lemon* v. *Sloan,* 346 F. Supp. 1356 (E. D. Pa. 1972), U. S. Sup. Ct., Docket No. 72-459) An analysis of those states statute demonstrates that these invalidated plans are distinguishable in many significant aspects from the poverty area/low income assistance plan of New York.

(1) *Ohio Plan distinguished (Wolman v. Essex,* 342 F. Supp. 399 (E. D. Ohio 1972), aff'd. 41 Law Week 3167 (10-10-72)

The major joints of distinction between the Ohio Tuition reimbursement plan and the New York plan are as follows:

a) Method of Payment encourages excessive entanglement

The Ohio plan provides for state aid payments to local school districts which in turn make tuition reimbursement payments to eligible parents. Such procedure engenders excessive religious entanglement with public officials at local community levels. The New York statute provides for direct payment by the State Commissioner of Education to the applying parent.

b) Uncertain amount of payment

The Ohio tuition reimbursement payments were fixed at $90 for the first year and then left to the determination

of the Commissioner of Education in future years. On its face, such procedure invites ongoing political entanglement. The New York tuition reimbursement payments are fixed by statute.

c) Tuition, Reimbursement Payments Not Limited to Secular Purposes

Under the Ohio plan, a parent could be reimbursed 100% of the tuition paid for his child. In such instances, a portion of the State payment would represent aid for religious instruction. The New York statute provides for a maximum 50% reimbursement, or in other words a Statistical Guarantee of Neutrality. In New York 30% of the total cost of education in nonpublic schools is paid by tuition, the remainder is derived through voluntary contributions, endowments and the like. The maximum tuition reimbursement by the State is thus only 15% of educational costs in the nonpublic schools. Therefore, in no instance could it be persuasively argued that New York's tuition reimbursement payment supports any religious teaching whatsoever, since the compulsory education laws of the State, by necessity require significantly more than 15% of school time to be devoted to teaching secular courses.

d) Tuition reimbursement payments not limited to low-income families

In not restricting the tuition reimbursement payments to low-income families, the Ohio plan was not an educational welfare benefit plan, and was not responsive to the particular financial plight of the low-income parent. The New York plan is solely geared for and restricted to low-income families.

e) Tuition reimbursement payments not responsive to costs of tuition

The nonpublic schools in Ohio instituted a tuition program just prior to enactment of the Ohio plan, thus raising the specter that the plan was a subterfuge to channel monies directly to nonpublic schools. The New York plan, on the other hand, is responsive to a long-established tuition program for the support of nonpublic schools. Its only purpose is to allow low income parents to participate in such nonpublic schools.

(2) *Pennsylvania Plan Distinguished (Lemon* v. *Sloan*, 346 F. Supp. 1356 (E. D. Pa., 1972), U. S. Supreme Court Docket No. 72-459)

The Pennsylvania tuition reimbursement plan bore many of the same infirmities as the Ohio plan. The Pennsylvania statute failed to restrict the amount of tuition reimbursement to less than 100% of tuition paid and also did not restrict the payments to low-income families. Of equal significance was the absence of any requirement that the parent had paid the tuition for his child. He was entitled to an immediate tuition reimbursement payment by merely promising to pay his child's tuition. Such a scheme is naturally fraught with unconstitutional problems.

The New York plan, on the other hand, provides reimbursement only on proof of actual payment of tuition and only following completion of the school year and it is limited to a maximum of 50% of the total tuition paid.

II. The Federal District Court in this case erroneously applied the decisions of this Court in the landmark decisions of *Everson, Allen, Walz, Lemon* and *Tilton*.

A. Federal District Court's Ruling on the Unconstitutionality of Health, Safety and Welfare Grants.

It is submitted that the Federal District Court in this case erroneously applied the *ratio decidendi* in the landmark cases of *Everson* v. *Board of Education, supra, Board of Education* v. *Allen, supra, Lemon* v. *Kurtzman, supra, Walz* v. *Tax Commission,* 397 U. S. 690 (1970) and *Tilton* v. *Richardson, supra,* in arriving at its conclusion that the health, safety and welfare grants violate the First Amendment. The Court acknowledged that the "primary purpose" test met constitutional muster—i.e., that the Legislature's intent to maintain a quality education for students in economically impoverished areas was a legitimate legislative purpose. The Court argued, however, that such grants violated the "primary effect" test and the "excessive entanglement" test as enunciated by this Court. In concluding that the "primary effect" test was violated, the District Court reasoned that, although the grants are for such secular functions as janitorial, heat and light, the buildings in which such functions are performed may also be used for religioius instruction. Ergo, the grants aid religion.

Overlooked by the Federal District Court are the statements by this Court in *Lemon, supra,* 403 U. S., at 612 in which this Court implies that the true import of the "primary effect" test is not whether a religious institution derives *some* benefit from the program, but rather that it "... neither advances nor inhibits religion." Moreover, on the same day *Lemon* was decided, this Court acknowledged that

. . . "bus transportation, textbooks and tax exemptions all gave aid in the sense that religious bodies would otherwise have been forced to find other sources from which to finance these services. Yet all of these forms of governmental assistance have been upheld . . . The crucial question is not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion . . ."—*Tilton, supra,* 403 U. S. at 679. See also *Walz, supra,* 397 U. S. at 671-672.

In order to determine what factors distinguish permissible from prohibited aid, it is necessary to review briefly this Court's decisions which have considered forms of aid to church-related schools under the "primary effect" test. In *Everson, supra,* this Court upheld a statute which authorized the use of tax-raised funds to reimburse parents for the costs of transporting students to and from public and private schools. This Court held that the state could extend the benefits of public welfare legislation to all citizens despite the fact that such aid helped children to get to church-related schools and that there was the possibility that some children might not have been sent to church-related schools if their parents were required to pay transportation costs. This Court found that the purpose and effect of the law was to promote general public welfare by helping parents get their children safely to and from accredited schools. This Court concluded that the First Amendment does not require that the state cut off sectarian schools from general services "so separate and so indisputably marked off from the religious function." *Everson, supra,* 330 U.S.C. at 18.

In failing to come to grips with these guidelines, the Federal District Court in our case summarily dismissed

important safeguards contained in Chapter 414 of the New York law which insure that the general services furnished the nonpublic schools are separately and indisputably marked off from the religious function.

A "statistical guarantee of neutrality" is assured in the payment of the health, safety and welfare grants by the proviso that in no instance can such payments exceed one-half of the cost of like services furnished to public schools—an arithmetic computation presently ascertainable under New York State educational aid programs. Moreover, the requirement that nonpublic schools furnish an independent annual audit of the application of such grants, further assures that the funds are separately and indisputably marked off from the religious mission. Certainly these legislative safeguards afford reasonable assurance that the grants of public funds are limited to secular functions.

Nor do such reasonable safeguards violate the "excessive entanglement" test, as the Federal District Court implies. This Court in *Lemon* has recognized the necessity of public "entanglement" in religion when essential to enforce building and fire regulations affecting nonpublic schools. Any entanglement incidental to reviewing a private audit of the application of health and safety grants can scarcely be characterized as excessive. To be sure, long-standing programs of entanglement, such as requiring nonpublic schools to prepare and submit to the State daily attendance requirements and to administer scholastic achievement tests to satisfy State minimum educational requirements, entail much more excessive entanglement than would flow from the State's administration of a program of health, safety and welfare grants for the relatively small number of 280 nonpublic schools located in economically impoverished areas of the State.

B. Federal District Court's Ruling on the Unconstitutionality of Tuition Reimbursement Payments.

The Federal District Court likewise overlooked the important features of New York State's tuition reimbursement program, which insure that the payments are secular. Like transportation aid, tuition reimbursement payments are tantamount to the extension of the benefits of public welfare legislation to needy citizens despite the fact that such aid helps children to get to church-related schools and that there is the possibility that some children might not be sent to church-related schools if their parents were required to pay such costs.

In addition, limiting the tuition reimbursement payments to no more than 50% of the actual tuition paid by the parent for his child insures that such reimbursement is not for the costs of instruction in religion. One cannot persuasively argue that over 50% of the tuition expenses of a child in nonpublic schools are for religious instruction, especially since tuition represented only 30% of the educational costs in nonpublic schools.

Equally nonpersuasive is the argument posed by the Federal District Court that "[i]f State subsidy may be given for religious education, why may it not be given to the poor for the purchase of sacramental wine, or a Crucifix or a Torah . . ." etc. The flaw in that argument obviously lies in the fact that the law does not compel people to go to church, while it does compel a parent to send his child to a school (while, in addition, compelling the parent to pay for the support of public schools).

III. Legislative bodies and political institutions should not be curtailed in their Constitutional right to a free and open debate of issues touching on religion.

The exercise of such fundamental rights as Freedom of Speech and Expression and the reserved sovereign powers of the states are endangered by the opinion of the Federal District Court in this case. In declaring unconstitutional Section 1 of Chapter 414 of the 1972 Laws of New York State, the Court implied that the Establishment Clause of the First Amendment was breached since this legislation . . . "would encourage future divisive debate on religious lines". The Court stated that "The political pressures on the Legislature are bound to be strong along religious lines." As authority for this proposition, the Federal District Court relied on the statements of this Court in *Lemon, supra,* 403 U. S. at 623.

Traditionally, state legislative bodies and other political institutions have exercised the right to free and open debate of any subject or issue no matter how politically divisive it may be on segments of our society.

It is submitted that "political divisiveness" should not be relied on as a basis for curtailing legislative debate and enactment of legislation respecting issues of a religious nature. Judicial adherence to such a concept may well lead to the resolution of peculiarly volatile social, political and economic issues outside the framework of our democratic process in a manner that is "extra-legal".

The narrow decision in *Lemon* must not foreclose state legislatures from the consideration of other possible and permissible routes of programming non-public school aid. Certainly it is the task of the state legislatures with the guidance of this Court to evolve the boundaries of constitutional permissibility.

CONCLUSION

It is in the interest of the State of New York to insure that all children regardless of race, color, religion, national origin, income level or poverty background are educated to their fullest potential. It would not be in New York State's best interest to require that all children attend public schools. Such a requirement would mean that an additional 750,000 children (approximately 18% of the total State public and nonpublic school enrollment) would move into the public school system at an operational cost of $1400 per pupil, plus capital costs.

Many of the public schools and especially the ones in the poverty areas are already overcrowded, and an influx of any substantial number of nonpublic school children would compound current adverse pupil-teacher ratio problems. Such an influx would cost the State of New York and local school districts over $1 billion each year in additional operating costs alone. This would aggravate the existing financial crisis in education to a breaking point.

There are other benefits flowing from the availability of nonpublic school education. These benefits include diversity in education, competition in education stimulating progress, experimentation and innovation in non-governmental schools, pluralism, prevention of State monopoly in education, freedom of education, and freedom of thought. New York State has a fine public school education, and it is essential that it continues to exist and flourish. However, a monopolyed education is not the way to accomplish this goal. (See, *Minnersville School District* v. *Gobitis,* 310 U. S. 598-599 (1939).

We contend that the decision of the District Court in this case fails to recognize the authority of the several states, under our Federal System, to legislate with re-

spect to nonpublic school education. It would appear that the District Court opinion is a blind adherence to the rhetoric of the *Lemon* decision without any perceptive analysis of the particular form of limited aid advanced by New York to poverty area schools and low income parents.

It is submitted that the New York program of partial, and limited and restricted health, safety and welfare assistance to poverty area nonpublic schools and its related program of partial tuition reimbursement assistance limited solely and specifically to low income parents is consistent with and in response to permissible constitutional guidelines set forth by this Court and the United States Constitution.

We believe that the questions presented by this appeal are substantial and that they are of public importance.

Dated: November 20, 1972

Respectfully submitted,

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APPENDIX A

Opinion of the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 2286

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERT ADAMS, BERNARD BACKER, ALGERNON D. BLACK, THEODORE BROOKS, HERSCHEL CHANIN, NAOMI A. COWEN, ROBERT B. ESSEX, FLORENCE FLAST, REBECCA GOLDBLUM, BENJAMIN HAIBLUM, MARTHA LATIES, BLANCHE LEWIS, ELLEN A. MEYER, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, ALBERT SHANKER, HOWARD M. SQUADRON, and CHARLES H. SUMNER,

Plaintiffs,

—against—

EWALD B. NYQUIST, as Commissioner of Education of the State of New York, ARTHUR LEVITT, as Comptroller of the State of New York, and NORMAN GALLMAN, as Commissioner of Taxation and Finance of the State of New York,

Defendants,

—and—

GERALDINE M. BOYLAN, PRISCILLA L. CHERRY, JOAN M. DUCEY, NORA H. FERGUSON, ANGELINA M. FERRARELLA, ERNEST E. ROOS, JR. and ADAMINA RUIZ,

Intervenor-Defendants,

—and—

SENATOR EARL W. BRYDGES, as Majority Leader and President Pro Tem of the New York State Senate,

Intervenor-Defendant.

Opinion of the District Court

Appearances:

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Before: HAYS, *Circuit Judge*, CANNELLA, *District Judge* and GURFEIN, *District Judge.*

Opinion of the District Court

URFEIN, *D.J.*

We are again confronted with the question of the constitutionality of an Act of the New York Legislature relating to nonpublic schools, the children who attend them, and their parents. The plaintiffs are an unincorporated association and individuals who are residents of the State of New York and who pay income taxes and other taxes to that state. Some of the plaintiffs have children attending public schools. The defendants are the Commissioner of Education, the Comptroller and the Commissioner of Taxation and Finance of the State of New York.[1]

Jurisdiction is alleged under United States Code, Title Sections 1331, 1343(3), 2281, 2283, 2201 and 2202. The ount in controversy, exclusive of interest and costs, is eged to be in excess of $10,000.

By consent of all parties, a motion to convene a three-ge court pursuant to Title 28, Sections 2281 and 2283, granted, and this Court was convened.

The plaintiffs seek to enjoin the defendants from ap-ving or paying any funds or according tax benefits as vided in the Act to be described. The State seeks a issal of the complaint on the merits but asserts no sdictional bar to maintenance of the action.

nce no trial has been had, the attack upon the several s of the Act assumes that they are each facially uncon-tional under the Establishment Clause of the First ndment to the United States Constitution. The Act Y. Laws of 1972, c. 414) is divided into five parts,

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[1] arents of children enrolled in nonpublic schools have been tted to intervene as parties defendant. Similar permission ranted to Hon. Earl W. Brydges, Majority Leader and Presi-ro *tempore* of the New York State Senate.

three of which are attacked by the plaintiffs as being in violation of the establishment clause which guarantees the separation of Church and State, as applied to the states by the Fourteenth Amendment.[2] These three parts of the statute which are under attack may be summarized as follows:

A. Section 1 provides for grants of money directly from the State Treasury to nonpublic schools for "maintenance" of the buildings if the nonpublic school has been designated during a base year as "serving a high concentration of pupils from low-income families for purposes of Title IV of the Federal Higher Education Act of 1965 (20 U.S.C.A. §425)."[3] If the school qualifies under the federal standard, it is to be given a direct grant of $30 per pupil in attendance, which is increased to $40 per pupil to those schools which are more than twenty-five years old.[4] The grants, which are given directly to the particular nonpublic schools eligible for such grants, are to be in reimbursement of "maintenance and repair" costs incurred in the preceding year. "Maintenance and repair" is defined as "the provision of heat, light, water, ventilation and sanitary facili-

[2] The sections of the Act not under attack provide for impacted aid to public schools which have increased enrollment due to the closing of nonpublic schools, and provide for the purchase of nonpublic school buildings by public school districts where the nonpublic school has been closed (Sections 6-10).

[3] 20 U.S.C. §425 deals with the partial forgiveness by the Federal Government of certain educational loans to students who become teachers in "a school in which there is a high concentration of students from low-income families," and provides a method for determining that criterion.

[4] The amount of the grants is limited to "fifty per centum of the average per pupil cost of equivalent maintenance and repair in the public schools of the state on a state-wide basis, as determined by the commissioner."

ties, cleaning, janitorial and custodial services; snow removal; necessary upkeep and renovation of buildings, grounds and equipment; fire and accident protection; and such other items as the commissioner [the State Commissioner of Education] may deem necessary to ensure the health, welfare and safety of enrolled pupils." Each qualifying school which seeks an apportionment is required to submit to the Commissioner an application which shall include an audited statement of the expenditures of maintenance and repair of such qualifying school for the base year.

This part of the Act is entitled "Health and Safety Grants for Nonpublic School Children" and is prefaced by certain legislative findings. These recite that: (1) it is the primary responsibility of the state to ensure the health, welfare and safety of children attending both public and nonpublic schools; (2) "[f]inancial resources necessary to properly maintain and repair [deteriorating] buildings are beyond the capabilities of low-income people whose children attend nonpublic schools;" (3) teachers are given incentives by the Federal Government to teach in these poor areas; (4) healthy and safe nonpublic schools contribute to the stability of urban neighborhoods; and finally (5) "[t]o insure a healthy and safe school environment for children attending nonpublic schools, the state has the right to make grants for maintenance and repair expenditures which are clearly secular, neutral and non-ideological in nature."[5]

[5] Because of the suggestion that it was essential for the State to know promptly whether it could disburse the funds as provided in Section 1, we announced in a *per curiam* opinion our holding that this Section was in violation of the First Amendment as applied to the states by the Fourteenth Amendment. This opinion elaborates that decision.

B. Section 2 of the Act provides for flat tuition grants from the State Treasury to parents with family incomes of less than $5,000 per annum who have children attending elementary or secondary nonpublic schools. The grant is in the sum of $50 a year for children in grades 1 through 8, and $100 in grades 9 through 12. The tuition reimbursement cannot exceed 50% of the actual tuition payment made by the parent. The Commissioner is given "responsibility for the administration of the program" and is given authority to "promulgate such regulations as are necessary to carry out the provisions of this article." This section is entitled "Elementary and Secondary Education Opportunity Program."

Section 2 is prefaced by legislative findings that (1) "[t]he vitality of our pluralistic society is, in part, dependent upon the capacity of individual parents to select a school, other than public, for the education of their children"; (2) the Supreme Court of the United States has recognized this "right" of selection, but the "right" is diminished or denied to children of poor families whose parents have the least options in determining where their children are to be educated; (3) any precipitous decline in the number of nonpublic school pupils would cause a massive increase in public school enrollment and costs which would seriously jeopardize quality education for all children and aggravate an already serious fiscal crisis in public education; and (4) it is a legitimate purpose for the State to partially relieve the financial burdens of parents who provide a nonpublic education for their children.

C. Sections 3, 4 and 5 provide that an individual shall be entitled to subtract, for State income tax purposes, from

his Federal adjusted gross income an amount shown in a table for his New York adjusted gross income, multiplied by the number of his dependents, not exceeding three, attending a nonprofit nonpublic school on a full time basis, provided that he has paid at least fifty dollars in tuition for each such dependent.[6] This exclusion may be taken only by parents with adjusted gross incomes of from $5,000 to $25,000 who do not receive a tuition assistance payment under Section 2. The exclusion would be as much as $1,000 for each child, up to three children, enrolled in grades 1 through 12 with the net benefit to taxpayers apparently

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[6] The table is as follows:

If New York adjusted gross income is:	*The amount allowable for each dependent is:*
Less than $9,000	$1,000
9,000–10,999	850
11,000–12,999	700
13,000–14,999	550
15,000–16,999	400
17,000–18,999	250
19,000–20,999	150
21,000–22,999	125
23,000–24,999	100
25,000 and over	–0–

Estimated Net Benefit to Family		
One Child	*Two Children*	*Three or more*
$50.00	$100.00	$150.00
42.50	85.00	127.50
42.00	84.00	126.00
38.50	77.00	115.50
32.00	64.00	96.00
22.50	45.00	67.50
15.00	30.00	45.00
13.75	27.50	41.25
12.00	24.00	36.00
–0–	–0–	–0–

as shown in note 6, *supra*. The amount of income that may be excluded is reduced as the individual's adjusted gross income increases. The exclusion is deducted from adjusted gross income and is available to taxpayers whether they itemize or take the standard deduction.

This part of the Act is prefaced by legislative findings (§3) that (1) statutes already provide for the deduction from gross income for tax purposes of amounts contributed to religious, charitable and educational institutions; (2) nonpublic educational institutions are entitled to a tax exempt status by virtue of legislation which has been sustained by the courts; (3) by their existence, such educational institutions relieve the taxpayers of the State of the burden of providing public school education for the children who attend nonpublic schools; (4) tax laws also authorize deductions for education related to employment; and (5) similar modifications of Federal adjusted gross income should also be provided to parents for tuition paid to nonpublic schools.

We have stated the legislative findings offered in support of each part of the statute in detail because we wish to make it clear that we accept these findings, except where they purport to state principles of applicable constitutional law. They sum up legislative purposes which are cast as secular in intent. Thus, we must start with the assumption that the Legislature intended to preserve the health and safety of children who attend nonpublic schools in low-income areas. Similarly, we must start with the assumption that the Legislature intended to provide a quality education for all children who attend nonpublic schools in low-income areas. Similarly, we must start with the assumption

that the Legislature intended to provide a quality education for all children and to nurture a pluralistic society by giving money from the State Treasury to poor parents for tuition in nonpublic schools. And lastly we must assume that taxpayers as a body have, indeed, been relieved up to now of the burden of providing public school education for the children who attend nonpublic schools.

In sum, we do not go behind the statements of the New York Legislature, although it is manifest that, regardless of the variety of secular arguments advanced to support the legislation, the prime legislative concern is to see that religious parochial schools do not go under for lack of financial support. If that is constitutionally permissible, it is a worthy objective and one that should not be lightly set aside in the alleged interest of public education. Both public and nonpublic education can exist side by side. Neutrality forbids discrimination in favor of one system over the other.

Whether the main reason for this *legislative* concern is the fear that an intolerable financial burden will be cast upon the public schools if the nonpublic schools do go under, or whether the main reason is the survival of religious education, is not the particular *judicial* concern. We must weigh not only the purpose of the legislation but its effect on the traditional separation of Church and State in this country. As to the former, we accept the legislative statements. As to effect, we must exercise the judicial function of interpreting what effect the legislation will have upon areas protected from invasion by the constitutional guaranty.

This is, in essence, a conflict between two groups of extraordinary good will and civic responsibility. One group fears the diminution of parochial religious education which is thought to be an integral part of their rights to the free exercise of religion. The other group, equally dedicated, believes that encroachment of Government in aid of religion is as dangerous to the secular state as encroachment of Government to restrict religion would be to its free exercise. Since the policy of separating Church from State is not merely one of policy but of constitutional provision, the ultimate determination of such conflicts must rest in the judicial branch. And the judges must be especially careful in this delicate area not to allow their personal predelictions on policy to circumscribe their judgment as to the constitutional effect of particular legislative proposals. We must make a constitutional decision between these two worthy objectives. Yet, as an inferior federal court, we are not permitted to view the religion clauses of the First Amendment in a literal or even in an historical fashion. We have only to determine their meaning as authoritatively expounded by the Supreme Court. We shall, therefore, discuss the constitutionality of each of the three parts of the statute under the guidelines laid down by the Supreme Court, as we understand them.

I

The findings of the Legislature in respect of the needs of parochial schools in low income areas must, as we have said, be accepted as fact. For us to delve into the reasons why parochial education is stratified by the boundaries of richer or poorer districts would be improper, for that would be

trenching on the prerogatives of religious denominations which must determine their own priorities and administration without State interference under the Free Exercise Clause of the First Amendment, as well as under the negative implications of the Establishment Clause. It is not to be gainsaid that slum-area parochial schools do have financial troubles. The issue is whether it is constituttional for the State to maintain them. Of the estimated 280 schools in the low income areas, which the Legislature seeks to help, all or practically all, it was conceded upon the argument, are related to the Roman Catholic Church and teach Catholic religious doctrine to some degree. It is at this point that we must pause to review the history of the Establishment Clause in the courts in the light of the respective contentions of the parties.

The First Amendment of the United States Constitution, made applicable to the states by the Fourteenth Amendment (*Cantwell* v. *Connecticut*, 310 U.S. 296 (1940); *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943)), provides in part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . "

In *Everson* v. *Board of Education*, 330 U.S. 1, the Supreme Court was for the first time required to determine what was "an establishment of religion" in the First Amendment's conception (see *id.* at 29). It was there recognized by all the Justices that not simply an established church, but any law respecting an establishment of religion is forbidden and that schools teaching religion come within the scope of the clause prohibiting the "establishment of religion."[7] The precise issue in that case, upon which the

[7] *Id.* at 15 (Black, J.), see *Illinois ex rel. McCollum* v. *Board of Education*, 333 U.S. 203, 211 (1948).

Court divided five to four, was the constitutionality of a New Jersey statute which allowed reimbursement of parents for the bus fares of children attending parochial schools as well as public schools; the particular provision was held constitutional. In view of the broad meaning attributed to the Establishment Clause by all the Justices, it is instructive to consider the limitations set upon their own decision by a majority of the Court. In the words of Mr. Justice Black for the majority, the "establishment of religion" clause "means at least this: . . . No tax in any amount, large or small, can be levied to suport any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." *Id.* at 15-16. Nor is the prohibition only against a tax *levy* to support religious teaching. It is also against *using* tax-raised funds for that purpose. Mr. Justice Black wrote: "New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment *contribute* tax-raised funds to the support of an institution which teaches the tenets and faith of any church" (emphasis added).

The majority of the Supreme Court did conclude, nevertheless, that the reimbursement of bus fares to parents was public welfare legislation, and that New Jersey could not be prohibited from extending its general state law benefits to all its citizens without regard to their religious beliefs. But the Court was careful to note in support of its decision that "[t]he State contributes no money to the schools. It does not support them." 330 U.S. at 18.

The general language, however, did not remove the delicacy or the difficulty of the issues raised in succeeding cases. For we are a nation which recognizes value in religion but seeks to maintain neutrality in that sphere. Neutrality is not merely a state of mind, however. Neutrality inevitably means a relationship to religion, one way or another. And thus the Court formulated a two-fold test for sustaining legislation alleged to violate the Establishment Clause: There must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. *School District* v. *Schempp,* 374 U.S. 203, 222 (1963). The Court recognized that this test "is not easy to apply," but that a law which "merely makes available to all children the benefits of a general [New York State] program to lend school books free of charge" is not in violation of the Establishment Clause. *Board of Education* v. *Allen,* 392 U.S. 236, 243 (1968). This decision brought forth three dissents, as well as a concurrence by Mr. Justice Harlan on the limited ground that the statute there involved "does not employ religion as its standard for action or inaction" *Id.* at 250.

The bifurcated test of intent and effect was again accepted in *Walz* v. *Tax Commission,* 397 U.S. 664, 669 (1970), a case to which we shall advert later. Furthermore, to the two tests was added a third, that the statute must not involve an "excessive entanglement" with religion. *Id.*

Yet, the issue of direct financial grant to parochial schools had not yet confronted the Court. Last year, such an issue was finally presented in the case of *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971). This case is not only the most recent, but the most closely in point to the question of direct grants to primary and secondary parochial schools under Section 1

of the statute before us, as is *Tilton* v. *Richardson*, 403 U.S. 672, decided the same day.

The *Lemon* case involved legislative grants as supplements to teachers' salaries in parochial schools in Pennsylvania and Rhode Island. The Rhode Island statute contained a legislative finding that the quality of education available in nonpublic elementary schools was jeopardized by the rising salaries needed to attract teachers, and authorized state officials to supplement the salaries of teachers of secular subjects in those schools by direct limited payment to the teacher, who was to teach only subjects taught in the public schools and no courses in religion. The Pennsylvania statute contained a legislative finding of rapidly rising costs in the State's nonpublic schools, and authorized reimbursement by the State to nonpublic schools of actual expenses for teachers' salaries, text books and instructional materials only in teaching secular subjects, and expressly excluded religious teaching.

Each statute, it will be seen, makes a distinction between that function of the parochial school which teaches secular subjects and that function which teaches religion, and stresses that state aid is not to be given for religious teaching. However, both the Pennsylvania and the Rhode Island statutes were struck down by the Supreme Court as violative of the Establishment Clause.

The opinion by the Chief Justice chose to hold the state legislation in violation of the Establishment Clause on the third of the three tests—excessive entanglement. This excessive entanglement was found to be of two kinds—administrative and political. The latter was based upon the prediction that continuing financial pressures on the

nonpublic schools would, because of the annual nature of appropriations, generate considerable and recurring political activity to increase state aid, and that such activity would be along religious lines.

This choice of tests avoided the necessity to decide whether in *all* cases direct aid would be unconstitutional. But there is no indication, in our view, that the primary effect test, as a separate test, has been abandoned. And so far as precedent is concerned, the only direct aid to church-related institutions thus far sustained by the Supreme Court has been aid to hospitals, *Bradfield* v. *Roberts*, 175 U.S. 291 (1899) and the colleges in *Tilton*, where religious indoctrination was not a substantial purpose or activity of the church-related institutions. Nor was there any overruling in *Lemon* of various statements of the Justices that direct subsidy which aids schools with a religious mission would be unconstitutional. The striking down in *Tilton* of the provision inferentially permitting use of the buildings after twenty years for religious purposes, on the contrary, appears to bring such a subsidy within the primary effect test, without regard to the excessive entanglement test. *Tilton* is discussed more fully below.

While the opinions of the Justices who wrote separately supporting the result in *Lemon* differ in reasoning, the quintessence of what was held may, perhaps, be gleaned from the sole dissenting opinion, that of Mr. Justice White. 403 U.S. at 662. He stated the issue in the following terms: "Both the United States and the States urge that if parents choose to have their children receive instruction in the required secular subjects in a school where religion is also taught and a religious atmosphere may prevail, part or

all of the cost of such secular instruction may be paid for by governmental grants to the religious institution conducting the school and seeking the grant. Those who challenge this position would bar official contributions to secular education where the family prefers the parochial to both the public and nonsectarian private school. The issue is fairly joined." Mr. Justice White relied strongly on the Free Exercise Clause to support his dissent, a view also urged upon us. But the rest of the Court refused to consider the conceded constitutional right of a parent to send his child to a parochial school as sufficient to sustain the public subsidy by the States in the face of the Establishment Clause. And Mr. Justice White himself made it clear that his dissent in the Rhode Island case was based upon findings of the District Court, which he maintained were ignored by the majority; and in the Pennsylvania case, he dissented only from the holding that the statute was *facially* unconstitutional.

It is important, because of the varied reasoning of the majority, to note what Mr. Justice White, as well, considered to be unconstitutional, and then to compare that formulation with the issue before us. Mr. Justice White explained:

> "As a postscript I should note that both the federal and state cases are decided on specified Establishment Clause considerations, without reaching the questions that would be presented if the evidence in any of these cases showed that any of the involved schools restricted entry on racial or religious grounds or required all students gaining admission to receive instruction in

the tenets of a particular faith. For myself, if such proof were made, the legislation would to that extent be unconstitutional." 403 U.S. 671 n.2.

In the case at bar, we are dealing largely with the same parochial school system that was before this Court in *Committee for Public Education and Religious Liberty* v. *Levitt and Nyquist*, 342 F. Supp. 439 (S.D.N.Y. April 27, 1972). The answers to interrogatories made there established that New York State construed as permissible beneficiaries schools which (a) impose religious restrictions on admissions; (b) require attendance of pupils at religious activities; (c) require obedience by students to the doctrines and dogmas of a particular faith; (d) require pupils to attend instruction in the theology or doctrine of a particular faith; (e) are an integral part of the religious mission of the church sponsoring it; (f) have as a substantial purpose the inculcation of religious values; (g) impose religious restrictions on faculty appointments; and (h) impose religious restrictions on what or how the faculty may teach. (Answer to Interrogatory 7) There seems to be no dispute that the statute here is also intended to apply to such schools.*

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*The plurality opinion in *Tilton, infra*, by the Chief Justice makes it clear that the plurality were convinced that, with respect to the four colleges there involved, "religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities." 403 U.S. at 687. On the other hand, aid to primary and secondary parochial schools is supported in New York on the very ground that parents have the right to choose parochial school education for their children as an important incident to their free exercise of religion, which includes the right to provide for religious indoctrination of the children through the parochial school.

In *Tilton* v. *Richardson*, 403 U.S. 672 (1971), the Court held, five to four, that payments could be made under the Higher Education Facilities Act of 1963 to certain church-related *colleges* under one-time Federal construction grants for college facilities excluding "any *facility* used or to be used for sectarian instruction or as a place for religious worship or . . . primarily in connection with any part of the program of a school or department of divinity" (emphasis added). The Act permitted the Government to recover the funds granted within twenty years, if the restrictions on use of the building for religious teaching were not met. While sustaining the payments, the Court held unanimously that limiting the right of the Government to recapture the payment if the building should be used for religious purposes *after* twenty years was unconstitutional. It was accepted that the use of public funds for the construction of a building to be used for the teaching of religion was facially unconstitutional. Again, Mr. Justice White, while suggesting that the Court in *Tilton* was ruling that payments made directly to a religious institution are, without more, not forbidden by the First Amendment, 403 U.S. at 664, nevertheless concurred in the Court's invalidation of the provision whereby the restriction on the use for religious purposes of buildings constructed with Federal funds terminates after twenty years, 403 U.S. 665 n.1. The line drawn, it seems to us, is that while an entirely separate building of a church-related college, in no way related to the teaching of religion or the housing of worship, may receive public funds, it may not receive such funds from the moment when secular and religious teaching or prayer are mixed in the same building.

Moreover, a direct grant to the parochial school is not the same as an across-the-board payment to parents of parochial school children which advances the common good as distinguished from religious good, and which equalizes the burden of the nonpublic school parent. The majority by Mr. Justice White in *Allen, supra,* pointed out the distinction: "Thus, no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools." 392 U.S. at 243-44. Mr. Chief Justice Burger, in *Lemon,* noted that "the Pennsylvania statute, moreover, has the further defect of providing state financial aid directly to the church related schools." 403 U.S. at 621. He distinguished *Everson* and *Allen* on the very ground that there state aid was provided to the student and his parents—not to the church related school. And he noted that in *Walz* the Court had warned of the dangers of direct payments to religious organizations. *Id.*[*]

In Mr. Justice Brennan's view, "[g]eneral subsidies of religious activities would, of course, constitute impermissible state involvement with religion." *Walz* v. *Tax Commission, supra,* 397 U.S. at 690.

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[*] The impact of *Lemon* and *Tilton* on direct cash payments is suggested by two memorandum decisions filed on the same day. The Court vacated and remanded, for consideration in the light of *Lemon* and *Tilton*, *Kervick* v. *Clayton* and *Hunt* v. *McNair*, 403 U.S. 945 (1971). *Kervick* had upheld construction loans under the New Jersey Educational Facilities Authority Law, 56 N.J. 523, 267 A 2d 503 (1970). *Hunt* had upheld the issuance of bonds to pay off the indebtedness of a Baptist College under the Educational Facilities Authority Act, 255 S.C. 71, 177 S.E. 2d 362 (1970).

The Supreme Court of New Jersey, after the remand, held valid the statute which creates an Educational Facilities Authority to sell bonds and lend the proceeds to educational institutions, without

This view is supported by history. The New York State Constitution provides in Article XI, §3:

> "Neither the state nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught, but the legislature may provide for the transportation of children to and from any school or institution of learning."

Fewer than a half-dozen states omit such a provision. See 403 U.S. 647, n.6. While the ultimate decision in the *Tilton* case prohibited a grant for construction of a building used for religious teaching (even after twenty years), the Constitution of New York itself prohibits the granting of such funds for "maintenance," the very objective of Section 1 of the statute we are considering. While it is not our purpose to determine constitutionality under the New York Constitution—a matter reserved for the State courts

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pledging the credit of the State. *Clayton* v. *Kervick*, 59 N.J. 583, 285 A. 2d 11 (1971). But it concluded that even with respect to loans, as distinguished from grants, a facility may not be used for sectarian instruction or as a place of religious worship even after repayment of the loans; and no college may participate if it restricts entry on racial or religious grounds or requires all students gaining admission to receive instruction in the tenets of a particular faith. *Id.* at 20-21.

The Supreme Court of South Carolina also upheld its loan statute which provided that the facilities involved shall not be used for sectarian instruction. *Hunt* v. *McNair*, 187 S.E. 2d 645, 652 (1972).

—we cannot avoid being impressed, in our consideration of the guidelines of the Supreme Court, by the almost unanimous views of the states as expressed in their respective constitutions adopted by the people.

The argument is made, however, that since janitorial functions and snow removal obviously are not the teaching of religion, thejr neutral character permits a benevolent grant for these purposes from the tax raised funds in the State Treasury. The argument is bottomed on the assumption that a parochial school budget is divisible. It rejects the argument that once a public subsidy is given it lightens the burden on the rest of the budget and even permits more of the other private money to be used for religious instruction. Not having to pay the janitor makes it reasonable to assume that the money otherwise going to him can be used to increase the salary of a religious teacher or the fund for the purchase of objects of religious devotion. If it be argued that the subsidy would go only to the needy parochial school which has no surplus to apportion, the short answer is, of course, that such a parochial school would have more than it has now, for it does now pay from its present budget for janitor services and heat.[10]

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[10] The State urges upon us for consideration some language of Chief Justice Burger in *Tilton, supra,* to the effect that "[c]onstruction grants surely aid these institutions [the church-related colleges] in the sense that the construction of buildings will assist them to perform their various functions." 403 U.S. at 679. The State notes that this form of governmental assistance was upheld.

Taking it in its literal sense the argument from the language is a fair one. But the quoted language must be read in the light of the Chief Justice's actual holding that use of the buildings for religious purposes, even after twenty years, was unconstitutional.

The vice, moreover, is not only that the school budget as such is indivisible, but that no effort is made in this part of the statute to distinguish between secular and religious education. The janitorial service embraces cleaning the chapel, where there is one, and heat is provided to the classrooms where religion is taught. There is no suggestion that heat is to be cut off while prayer or religious teaching is conducted in the same schoolroom. Cf. *Illinois ex rel. McCollum* v. *Board of Education*, 333 U.S. 203, 211 (1948).[11]

Nor is the aid provided, though neutral in the sense of direct religious activity, given to any but a small class of institutions, almost all Roman Catholic, in deprived areas. It provides direct support for the maintenance of schools which teach religion.

Moreover, as Chief Justice Burger said in *Walz, supra*, "Obviously a direct money subsidy would be a relationship pregnant with involvement," 397 U.S. at 675. The "involvement" includes the inevitable auditing of reports of expenditures for maintenance and repair which surely must include the right of the State to determine the fairness of the charges made. The determination must be made

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[11] The Supreme Court of Wisconsin recently held to be in violation of the Establishment Clause of the First Amendment a statute which authorized the contracting for purchase of dental education by the University [Marquette] dental school because it permitted the use of funds paid under the contract "in support of the operating costs" of the university without limiting the use of such funds exclusively to the providing of dental education in the dental school of the university. *State ex rel. Warren* v. *Busbaum* (State No. 266, July 7, 1972). This result was reached even though the Court recognized that the very nature of dental education assures the completely secular nature of the teaching of dentistry.

whether the expenditures were, in fact, commensurate with the amount of the grant under the formula.

And the very percentage formula ($30 or $40 per pupil out of the entire tuition), honestly intended to avoid use of the subsidy for religious purposes, inevitably requires an assessment of how much of the education supplied is secular and how much religious. It is argued that the Legislature was careful to allow only fifty per cent of the actual costs of "maintenance and repair," as a maximum, and that this is assurance that the maintenance grant is not for religious teaching. But the very argument invites considerations of the percentage relationship of secular to religious teaching and the relative impact of religious indoctrination. The *Tilton* approach is not possible where the school to be benefited is not merely church-related but is itself part of the religious mission. If the Legislature is to be asked to determine formulas based on religious teaching *vel non*, it invites the very excessive entanglement we were instructed to avoid in the *Lemon* case.

If public subsidy for janitorial service and heat to needy nonpublic schools is allowed, we may ask whether the next step will not be to supply desks and blackboards and ultimately part of a building on a percentage basis, on the ground that these are not religious in character. Would it not then be argued that where a building is in serious disrepair it is better not to patch it up but to build a new building with public funds on the ground that such would be a health and welfare grant?

Nor is the argument based on the police power of the State convincing. Education is as much an important function within the police power of a State as are health and

safety. See *Brown* v. *Board of Education*, 347 U.S. 483, 493 (1954). The conflict of the First Amendment with the police power has been made apparent in the constitutional decisions affecting educational activity by the states. Almost any legitimate activity, except the teaching or preaching of religion itself, can be said to be within some element of police power of the State. Yet, a State law enacted in the exercise of otherwise undoubted State power may not prevail against Federal law. See *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U.S. 225, 229 (1964). State power, as we have been instructed, cannot, in this area, leap the constitutional barrier when it uses direct, special subsidy as the means to implement such power.

The political pressures on the Legislature are bound to be strong along religious lines. As the Chief Justice said in *Lemon*: "The potential for political divisiveness related to religious belief and practice is aggravated in these two statutory programs by the need for continuing annual appropriations and the likelihood of larger and larger demands as costs and populations grow." 403 U.S. at 623.[12]

To summarize our reluctant conclusion that we cannot sustain a direct public subsidy for the "maintenance and repair" of religious schools under the guidelines of the

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[12] The brief of Senator Brydges argues that "[i]t is beyond the authority of the courts of the United States to dictate to the sovereign legislatures of the several states the parameters of its [sic] debates" (p. 37). We think that the Supreme Court, in its emphasis on "excessive entanglement" did not intend to limit legislative debate, but rather to strike down legislation which would encourage future divisive debate on religious lines. Whether this constitutional test should be modified is not within the province of this District Court. The argument can be made only to the Supreme Court.

Supreme Court, our points of departure with the argument of the State of New York are that: (1) "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to *teach* or practice religion." *Everson, supra,* 330 U.S. at 16 (emphasis added). We think *Tilton* does not overrule the application of the dictum to the case at bar. (2) The statute involved, though concentrating on schools in deprived areas, makes no distinction between secular and religious teaching, and tax-raised funds are directly used for the maintenance of buildings which teach religion. (3) We cannot accept the view that, under present doctrine, budgets for churches, synagogues or parochial schools can be made divisible by ascribing a percentage of cost to neutral functions. (4) On the contrary, we interpret the dictum of the Supreme Court that neutral services may be afforded to parochial schools to mean simply that general services, such as transportation, secular books, free lunches and, perhaps, athletic training, visiting nurses and the like, afforded to students in *all* schools may also be made available to students in parochial schools. (5) We think that, unlike the one-time construction of new buildings as in *Tilton,* the "maintenance and repair" provisions of the New York statute involve "continuing financial" and political "relationships [and] dependencies." *Tilton, supra,* 403 U.S. at 688.[11]

In sum, we hold that, although we accept the intention of the legislation as being essentially secular and within

[11] It must be noted that the colleges involved in *Tilton* were not directly controlled by the church; the elementary and secondary schools covered by the New York statute are controlled by a religious hierarchy.

the police power of the State, the effect of Section 1 of the statute in its present form is inevitably to advance religion. We hold, alternatively, that that Section creates a potentially excessive entanglement of the State with religion with potentially undesirable consequences to both.

II.

Section 2 of the statute provides for partial reimbursement to needy parents for the tuition they pay to send their children to parochial schools. Although the payment is to the parent, by hypothesis he is within a low annual income bracket (below $5,000) which would make it possible that he could not afford to send his children to parochial school in the absence of a direct subsidy from the State Treasury. Indeed, it is the very assumption of the Legislature in its findings that he will use the money grant for tuition. Whether he gets it during the current year, or as reimbursement for the past year, is of no constitutional importance. The recipient is the parochial school. The source is the State tax-derived money. The parent is simply a conduit. See *Griffin* v. *County School Board*, 377 U.S. 218 (1964); *Griffin* v. *State Board of Education*, 239 F. Supp. 560, 563 (E.D. Va. 1965), *overruled on other grounds*, 296 F. Supp. 1178 (E.D. Va. 1969); *Wolman* v. *Essex*, 342 F. Supp. 399 (E.D. Ohio 1972).

While in the general distribution of a State aid program, as in the case of reimbursement of bus transportation to parents (*Everson, supra*), the loan of text books to students (*Allen, supra*), free lunches to children and the like, there is a distinction between a grant to the family and a grant to the parochial school, there is no such distinction

where the parent is a mere conduit for a payment of tuition. In the former, the costs assumed by the State were generally borne by the parents, in the first instance, and it is they who are being reimbursed, not the school. In the case of tuition, it is the school which benefits by getting tuitions from State funds which it might otherwise not receive.[14]

The essential reliance of the State in support of this part of the statute is twofold: (1) that the free exercise of religion is inhibited if the needy may not be subsidized with State funds to aid their "right" to a parochial school education for their children; and (2) that the State will gain economic benefit from supporting parochial schools, because otherwise the fiscal burden cast upon the State in the event of their unfortunate demise will be almost intolerable.

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[14] Senator Brydges' brief argues as "history" (p. 16) that with respect to Section 3209 of the N.Y. Education Law, the New York Attorney General in 1935 ruled that it applied to children attending parochial schools as well as public schools. We agree that the affirmative duty of "public welfare officials" to furnish "indigent children with suitable clothing, shoes, books, food and other necessaries to enable them to attend upon instruction as hereinbefore required by law" does not require the denial of these benefits to needy children who attend parochial schools. But there is nothing in that statute concerning the payment by the state of tuition for needy children. The Education Law involved a general grant to all which did not include tuition.

As to tuition, there may be situations where special circumstances make attendance at public schools impractical as in the case of orphan schools, see *Sargent* v. *Board of Education*, 177 N.Y. 317 (1904); Indian schools, Education Law, art. 83; and schools for deaf and blind children, *id.* art. 85. But those sections are not relevant to normal children who can attend the public schools.

These are serious arguments that cannot be disregarded, particularly when made by a State Legislature, and we have given considerable thought to their meaning and implications, particularly in the light of our sympathy for the argument that in a pluralistic society it is a positive good to have a variety of educational institutions, not all public. As we have delved into the implications of these arguments we have become convinced, however, that, under our oath to defend the Constitution, we must hold that they fail.

The argument based on the Free Exercise Clause has a superficial appeal. Why should a richer man have the right to practice his religion as he sees fit while a poor man cannot do so only because of his poor financial condition? Are we not a nation that abhors distinctions based on wealth, and have we not strained the fisc to equalize the condition of rich and poor before the law? Indeed, we have left partisanship behind in our common belief that equality, so far as it is possible to achieve, is a desirable goal for our society.

The propagation of religious doctrine was early made the responsibility of the particular denomination in hard times as well as good times. We know, however, that inflation was no concern of the framers of the First Amendment, and, as individuals, we sympathize with its victims. But a State-supported church school is simply not a part of our way of life, and the payment of tuition for its pupils makes the church school a State-supported school.[15]

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[15] In the language of Chief Judge Lord in *Lemon* v. *Sloan*, 340 F.Supp. 1356, 1364 (E.D. Pa. 1972): "The state cannot maintain that the Act has the purpose of promoting education by supporting nonpublic schools and then deny that the effect of the Act is to aid those schools."

While there can be no proof either way, it is possible that among persons eligible for the tuition grant there will be not only those who now have their children in a parochial school but also some whose children now attend the public schools and whom they would transfer to a parochial school.

The implications of recognizing a "right" to the support of public funds for the expression of the free exercise of religion are, moreover, staggering. Religious belief and the right to practice religion, including the teaching of the young, are precious rights to be preserved unto death itself. But a subsidy to those who practice a particular religion to enable them to observe its tenets is not compatible with either clause of the First Amendment. If State subsidy may be given for religious education, why may it not be given to the poor for the purchase of sacramental wine, or a crucifix or a Torah, a printing press for Jehovah's Witnesses, or for a trip to a Baptist convention or to hear a favorite evangelist, or for a Muslim to take his pilgrimage to Mecca. These are all "rights" to the free exercise of religion that cannot be denied, and from the exercise of which the poor may be excluded by circumstance.

If the Founding Fathers had any intentions about religion, it was surely to separate the concern of the Government from the concern of the individual religious community. That is why we have the double-edged religion clauses of the First Amendment—no law respecting the establishment of religion *or* the free exercise thereof. Each sector must not only respect its own proper functions. Each must also support them. This appears to be the essence of the voluntarism requirement of the First Amend-

ment; see Harlan, J., concurring in *Walz, supra,* 397 U.S. at 696.

The examples cited by the State to support its argument for tuition reimbursement to poor parents deal with the striking down of exactions by the State of money from the poor as a condition to their exercise of particular constitutional rights, like the right to sue in the courts for divorce without paying court costs, *Boddie* v. *Connecticut,* 401 U.S. 371 (1971), and the right to vote without paying a poll tax, *Harper* v. *Virginia Board of Elections,* 383 U.S. 663 (1966). So, too, *Sherbert* v. *Verner,* 374 U.S. 398 (1963) held invalid the denial of unemployment benefits where the free exercise of religion was inhibited. The statute here, on the contrary, affirmatively establishes benefits for the free exercise of religion. No case has been cited where an affirmative cash subsidy to advance the constitutional right to the free exercise of religion was allowed.

Nor do we ignore the argument forcefully put by the State and by representatives of the able majority leader of the State Senate. The possible closing of Catholic parochial schools on a large scale would cast a heavy burden on an already overburdened State. But we must recognize, within the guidelines set by the Supreme Court, that economic hardship alone is not enough to overcome the strictures of the First Amendment. The Court in *Lemon, supra,* accepted the legislative findings of economic stringency in the parochial schools, with the obvious, if not fully articulated, potential effect on the State finances of Rhode Island and Pennsylvania. It, nevertheless, struck down what were clearly economic measures to help the fiscal condition of

the nonpublic schools with the possible consequence of forced absorption of their burdens by the States.

The argument, like many good arguments, stretches the band to the breaking point. For it must be tested for validity against contingencies which could occur and which would have a strong effect on legislative action, not only because of religious pressures on the legislators, but because of the conviction that the public treasury has more to gain by supporting church schools directly than by not supporting them.

If conditions worsen, it would be proper, under this argument, to pay the salaries of the secular teachers. But that is what has just been invalidated by the Supreme Court. The argument would logically admit of circumstances, honestly based upon economic need, which would support the grant of public funds, at least for secular education, in geographic areas where there were not enough parochial schools, and where the pressure of population would otherwise cause great hardship to the neighborhood public schools. Once we embark upon such a course, we fear that the meaning of the Establishment Clause will be diluted to the point where the State will support the parochial schools with the inevitable control by the State built into an anomalous situation. That is a condition devoutedly not to be wished. The proponents of this legislation will probably affirm that they are willing to take their chances on such an eventuality and that they would rather have the funds in hand. But it is the peculiar function of the judicial branch to remain unmoved by current desires, not in the sense of usurping the province of legislatures, but

in viewing basic constitutional provisions as outliving the generation of men which has to interpret them.[16]

III.

The third part of the statute, the tax credit for tuition paid by parents to nonpublic schools, we think stands in different case. In the first place, it is not restricted to areas which by concession are known to contain practically only Catholic parochial schools as in Part I. It covers attendance at *all* nonprofit private schools *in the State,* Second, it does not involve a subsidy or grant of money *from the State Treasury* as in Parts I and II. Third, it has a particular secular intent—one of equity—to give some recompense by way of tax relief to our citizens who bear their share of the burden of maintaining the public schools and who, because

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[16] (a) A similar conclusion was recently reached by a three-judge court in the Eastern District of Ohio. *Wolman* v. *Essex*, 342 F.Supp. 399 (E.D. Ohio 1972). There moneys had been appropriated for "educational grants to parents" and for the provision of neutral, non-religious "materials and services" for pupils attending nonpublic schools. The statute was held to be in violation of the Establishment Clause of the First Amendment.

(b) A Pennsylvania Act providing for reimbursement of tuition payments to parents whose children attend nonpublic schools was declared unconstitutional in spite of a legislative declaration that parents who send their children to nonpublic schools assist the State in reducing the rising cost of public education, and that if children now attending nonpublic schools were forced to transfer to public schools "an enormous added financial, educational and administrative burden would be placed upon the public schools and upon the taxpayers of the state." *Lemon* v. *Sloan, supra* at 1366 (three-judge court). Chief Judge Lord wrote: "If parents cannot afford to provide religious education for their children in sectarian schools without state aid, then by providing a program for aiding the parents, the state is plainly advancing religious education. The state has no more power to subsidize parents in providing a religious education for their child than it has to subsidize church-related schools to do so." *Id.* at 1365.

of religious belief or otherwise, send their children to nonpublic full-time schools, as is their constitutional right. See *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925). Fourth, the benefit to the parochial schools, if any, is so remote as not to involve impermissible financial aid to church schools. Lastly, there is a minimum of administrative entanglement with the nonpublic schools. Nor is the on-going political activity as likely, in our opinion, to cause division on strictly religious lines.

We shall explain our reasons briefly.

There has always been a sharp distinction in the history of the United States between direct grants of public funds to religious institutions, generally prohibited, and tax exemption for religious institutions, generally permitted. This indirect aid to religious institutions has largely taken two forms, exemption from local property taxes and the like, and income tax exemptions for contributions to religious institutions. The former method was lately before the Supreme Court in *Walz, supra.* The latter method has never been challenged in the Supreme Court. As the Court noted in *Walz*, the real property tax exemption provision for churches is two hundred years old. The acquiescence in the practice by the people, the historical absence of religious divisiveness, and the exemption's ancient orgin were considered to lend support to its exclusion from the restraints of the religion clauses of the First Amendment.

In *Walz*, the Court recognized that "[g]ranting tax exemptions to churches necessarily operates to afford an indirect economic benefit . . ." 397 U.S. at 674; yet the New York statute granting to churches as well as other educa-

tional and civic institutions exemption from real property taxes was sustained. The Court also noted in *Walz* that "[t]he grant of a tax exemption is not sponsorship since the government does not transfer part of its revenues to churches but simply abstains from demanding that the church support the state." *Id.* at 675.

It certainly can be argued that if the power to tax is the power to destroy, the power not to tax is the power to support. The Supreme Court has not accepted that view, and has rejected the argument that exemptions do not differ from subsidies as a matter of economics.

Our distinguished colleague, Judge Hays, in his dissenting opinion assumes constitutional invalidity because the "purpose and effect of the statute [Part III] are . . . to subsidize religious training for children." Why, then, it may be asked, does not an income tax deduction for a contribution to a church "subsidize" religious worship for parents? If, indeed, "there is no essential difference between a parent's receiving a $50 reimbursement for tuition paid to a parochial school and his receiving a $50 benefit because he sends his child to a parochial school," then there should be no essential difference between a parent's receiving a $50 "reimbursement" for a payment to his parish church and his receiving a $50 "benefit" for the same payment. As Judge Hays states it, "in both instances the money involved represents a charge made upon the state for the purpose of religious education." With great respect, we paraphrase this to say that, in our illustration as well, it could be said that the money involved represents a charge made upon the State for the purpose of denominational worship. Yet we

have abided this very condition in our taxing system for many years, although we know that some denominations conduct church-related Sunday Schools or even weekday afternoon classes in religion.

Whether the distinction is based on logic, history or simply on an authoritative guideline set by the Supreme Court, we may approach our difficult task with the distinction between subsidy and tax exemption in mind. It cannot be a perfect guide, for the statute involved in *Walz* gave real property tax exemption to a great many institutions, not only churches, there was no question of arbitrary classification, and alleged State involvement with religion was at least equivocal. On the other hand, in favor of its validity is the circumstance that under Section 3 of our statute, the income tax exemption (which is in effect a tax *credit* since the exemption is not intended to equal the parents' outlay) is to *individuals*, not to churches or church schools, a step removed. This kind of income tax relief, while not as old as property tax exemption because the constitutional income tax law itself is relatively modern, has been on the Federal statute books for more than half a century. It has been a consistent legislative policy ever since the 1917 Revenue Act for the Congress to permit the deduction of so-called charitable contributions from personal income.[17] This has always included direct gifts to churches. The purpose is no doubt to encourage such contributions. 5 J. Mertens,

[17] Revenue Act of 1917, c. 63, §1201(2), 40 Stat. 331. That statute allowed as a deduction, "[c]ontributions . . . made to corporations or associations organized and operated exclusively for religious, charitable, scientific or educational purposes."

Law of Federal Income Taxation §31.01 (1969); *Bliss* v. *Commissioner*, 68 F. 2d 890 (2 Cir. 1934), *aff'd*, 293 U.S. 144 (1934).

We think that, aside from the "equal protection" problem which we do not pass upon, the credit against gross income of a fixed amount if tuition is paid to nonpublic schools, does not sponsor, or render forbidden financial support to church schools, at least in the limited form in which relief is given here. Credit is allowed not only to parents who pay tuition to a religious school but also to any nonprofit, nonpublic secular school. The table in the statute is geared roughly to the tax brackets and the rate of tax imposed on each bracket. The result ranges from a small, almost token, forgiveness to a family which attains an adjusted gross income of almost $25,000 to a forgiveness roughly approximating the tuition cost of $50 per child for a family in the lowest bracket. A memorandum prepared by Senator Brydges indicates that a family with three children in a nonpublic school would get a net benefit annually ranging from $150 if the family has an adjusted gross income of less than $9,000, to $36 if the family has an adjusted gross income of $24,999. The benefit is inverse to income. And we believe the Legislature has power to decide between allowing deductions and allowing credits.[18]

It seems to us unlikely, at least in the absence of strong proof, that a person having $6,000 to $9,000 per annum as an adjusted gross income would take his forgiveness or windfall, and hand it back to the parochial school as addi-

[18] A deduction of $150 for a person in a 6¾% tax bracket ($7,000 to $9,000) would have given him only a nine dollar benefit.

tional tuition. He would, more likely, compensate himself for the tuition paid in an amount which would otherwise have gone to the State for income taxes. Thus, it is likely that while the State loses revenue, as it does generally in allowing charitable deductions, it does not aid the parochial school, as it may, indeed, do when it allows deductions for direct contributions to the church. If, in fact, persons in a somewhat higher bracket should forego the forgiveness and turn over the tax saving to the church, that would be a voluntary act, not different in kind from an ordinary church contribution. Indeed, it is to be hoped that at least part of the costs of educating poor children will come from this source.

Once we have hurdled the constitutional barrier to income tax benefit for contributions directly made to churches, as we believe we must, there is not much further to travel. It is true that the argument may be advanced as the dissenting opinion does that the parent receives a consideration in the education of his child, while there is no *quid pro quo* in a contribution to a church. And we understand that the Federal tax authorities do scrutinize contributions of parochial school parents with that yardstick. See *Fausner* v. *Commissioner*, 55 T.C. 620 (1971).

We are not dealing, however, with the interpretation of a revenue act but with an inquiry upon the limitations of the power of a State Legislature under the Federal Constitution. As a Court, we may not pass on questions of religious values or even adumbrate the moral or religious "consideration" that may accrue to the donor of a gift to the church of his choice.

We put it more simply in practical terms. If a parishioner made a contribution to his parish, and the parish school were entirely free of tuition, would he be denied his income tax deduction because his child attended that school? Opinions may differ on the interpretation of present statutes, but it seems to us likely that an affirmative formulation by the Legislature would be constitutional.

We have not been asked to pass upon the constitutionality of part three on "equal protection" grounds, and we do not do so, cf. *Everson, supra,* 330 U.S. at 4-5.[10] Putting such argument to one side, we think that the pressure on legislators to amend the income tax law is likely to be more from nonpublic school parents as a group rather than from parents of a single religious denomination. The principles of equity rather than of religious aid will probably be put to the fore if further liberalization by the Legislature is sought. And that we believe would not make for an inevitable excessive entanglement with religion in the legislative halls. As to administrative entanglement under part three of the statute, we see none beyond checking with the school simply to determine whether the tuition claimed to have been paid was actually paid.

We note, moreover, that the secular purpose as well as its effect is strong. The lightening of the tax burden of those who contribute to public education while deriving no benefit from it for themselves, albeit theirs is a voluntary

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[10] There the Court refused to consider whether the apparent exclusion of "private schools run for profit", violates the Equal Protection Clause of the Fourteenth Amendment, because the statute was not challenged on that ground.

choice, is a legitimate legislative purpose. In effect, it is no different from giving some exemption from school tax to childless couples or the aged who no longer have children of school age. The Legislature certainly has a broad power to classify in a tax statute. 1 J. Mertens, *supra*, §4.09. As we have said, however, we do not now deal with the "equal protection" argument, the reasonableness of the classification by those standards, or whether there is an appropriate governmental interest suitably furthered by the different treatment. See *Police Department* v. *Mosley*, — U.S. —, 92 S. Ct. 2286 (1972).

We hold only that Section 3 of the statute is not in conflict with the First Amendment Establishment Clause, as applied to the states through the Fourteenth Amendment.

We also find Section 3 of the statute separable from the parts found to be unconstitutional. The statute itself contains a separability clause (§11). And we are not required to invalidate the entire Act. See *Tilton, supra*, 403 U.S. at 683-84; *Champlin Refining Co.* v. *Corporation Commission*, 286 U.S. 210, 234 (1932).

A permanent injunction will be issued against the enforcement of Sections 1 and 2 of the statute. Judgment will be entered accordingly, pursuant to Fed. R. Civ. P. 54(b). The Court expressly determines that there is no just reason for delay. A permanent injunction against enforcement of Section 3 of the statute will be denied. The complaint so far as it relates to Section 3 of the statute, will not be dismissed, however. The parties may move for summary judgment or for an expedited trial.

An order will be settled on notice.

The foregoing shall constitute the Court's findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a).

Dated: October 2, 1972.

PAUL R. HAYS, *U. S. C. J.*
(Dissenting in part)

JOHN M. CANNELLA, *U. S. D. J.*
MURRAY I. GURFEIN, *U. S. D. J.*

HAYS, *Circuit Judge*, in part concurring in the result; dissenting in part:

I am in agreement with the view of my colleagues that the part of the state statute (N.Y. Laws of 1972, c.414) providing for grants to private schools for the maintenance of buildings cannot survive a challenge based on the Establishment Clause and the cases decided under it. *Tilton* v. *Richardson*, 403 U.S. 672 (1971); *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971); *Walz* v. *Tax Comm'n*, 397 U.S. 664 (1970); *Bd. of Education* v. *Allen*, 392 U.S. 236 (1968); *Everson* v. *Bd. of Education*, 330 U.S. 1 (1947). I agree with Judge Gurfein's view that the part of the statute providing for flat tuition grants to low-income parents is also unconstitutional. In addition to the cases previously cited see also *Wolman* v. *Essex*, 342 F. Supp. 399 (E.D. Ohio, 1972) (three judge court); *Lemon* v. *Sloan*, 340 F. Supp. 1356 (E.D. Pa., 1972) (three judge court). I therefore concur in the result reached by Judge Gurfein as to these aspects of the statute.

I dissent from the court's judgment concerning section 3 of the state act. I believe that that section, which provides for tax benefits with respect to tuition paid by the taxpayer for children attending religious schools, is also unconstitutional.

The purpose and effect of this provision of the statute are the same as the second portion, i.e., to subsidize religious training for children.[1] Both sections aim to reimburse

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[1] Although section 3 is made applicable to parents whose children attend *any* nonprofit nonpublic school, the overwhelming majority of these parents are sending their children to religious schools where sectarian indoctrination takes place. According to the

parents who have chosen to send their children to religious schools. As Mr. Justice Jackson said:

> "The prohibition against establishment of religion cannot be circumvented by a subsidy, bonus, or reimbursement of expense to individuals for receiving religious instruction and indoctrination." *Everson* v. *Bd. of Education*, 330 U.S. at 24 (Jackson, J. dissenting).

And "[w]hat may not be done directly may not be done indirectly lest the Establishment Clause become a mockery." *Abington School District* v. *Schempp*, 374 U.S. 203, 230 (Douglas, J. concurring).[2]

The benefits of the tax exemption allowed by section 3 are of the same nature as those accorded under the tuition reimbursement provisions of section 2. There is no essen-

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Fleischman Commission report, religious schools make up 93.5% of New York State's *nonpublic* schools. The remaining 6.5% consist of both profit-making and nonprofit-making private schools. Report on Nonpublic Education in the State of New York for the New York State Commission on the Quality and Financing of Elementary and Secondary Education, "The Collapse of Nonpublic Education: Rumor or Reality?," Vol. 1, pp. 1-6. See Transcript in *Pearl* v. *Nyquist*, p. 64. The profit-making schools are not, of course, covered by section 3.

[2] In the context of racial discrimination, grants to schools, students or their parents to avoid the commands of the Fourteenth Amendment have been consistently struck down. See *Griffin* v. *School Bd. of Prince Edward County*, 377 U.S. 218 (1964); *Hall* v. *St. Helena Parish School Bd.*, 197 F. Supp. 649 (E.D. La., 1961), aff'd, 368 U.S. 515 (1962); *Lee* v. *Macon County Bd.*, 267 F. Supp. 458 (M.D. Ala., 1967), aff'd sub nom. *Wallace* v. *United States*, 389 U.S. 215 (1967); *Brown* v. *South Carolina State Bd.*, 96 F. Supp. 199 (D.S.C., 1968), aff'd, 393 U.S. 222 (1968); *Coffey* v. *State Educ. Finance Comm'n*, 296 F. Supp. 1389 (S.D Miss., 1969).

tial difference between a parent's receiving a $50 *reimbursement* for tuition paid to a parochial school and his receiving a $50 *benefit because* he sends his child to a parochial school. In both instances the money involved represents a charge made upon the state for the purpose of religious education.

The exemption of church property from ordinary taxation provides no analogy for the tax benefits of the present statute. The schools in the nonprofit nonpublic category in New York State are tax-exempt, N.Y. Real Prop. Tax Law §421 (1) (a) (McKinney Supp. 1971), and that status is not in dispute in this case. In *Walz* v. *Tax Commission*, supra, the Court believed nearly two centuries of acquiescence in and approval of such exemptions lent support to the proposition that the exemptions did not violate the Establishment Clause. 397 U.S. at 680. Moreover, the Court noted in *Walz* that the State had not "singled out one particular church or religious group or even churches as such; rather it [had] granted exemption to all houses of worship within a broad class of property owned by non-profit, quasi-public corporations . . . . " *Id.* at 673. Here, as the three judge panel pointed out in *Wolman* v. *Essex*, supra, "[t]he limited nature of the class affected by the legislation, and the fact that one religious group so predominates within the class, makes suspect the constitutional validity of the statute." 342 F. Supp. at 412. Finally, the *Walz* court held (p. 674) that:

> "Elimination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes."

The *Walz* decision, as the Court said in *Lemon* v. *Kurtzman*, supra, p. 614, "tended to confine rather than enlarge the area of permissible state involvement with religious institutions . . . ."

Nor does the present case concern the tax deductibility of religious contributions. Such contributions, even to church schools, are deductible under New York law, N.Y. Tax Law §360(10b) (McKinney 1966), and they would not be affected by the statute under scrutiny. Even assuming that tax deductions for contributions to religious schools are constitutional—a point not yet passed upon by the Supreme Court—we are not dealing with such deductions in the present case. A payment for services rendered is not a contribution, and such payments are not deductible. As the court said in *DeJong* v. *Commissioner*, 36 T.C. 896, 899-900 (1961), aff'd 309 F.2d 373 (9th Cir. 1962):

> "We are satisfied on the record before us that at least a portion of the $1,075 paid by petitioners to the society was in the nature of tuition fees for the education which the society was expected to furnish to petitioners' children and was not in fact a true charitable contribution. Payments pledged and made by parents in the circumstances disclosed by the evidence were not voluntary and gratuitous contributions motivated merely by the satisfaction which flows from the performance of a generous act; they were induced, at least in substantial part, by the benefits which the parents sought and anticipated from the enrollment of their children as students in the society's school."

See also *McLaughlin* v. *Commissioner*, 51 T.C. 233 (1968); *Fausner* v. *Commissioner*, 55 T.C. 620 (1971).

The tax benefit statute was quite frankly enacted as a substitute for partial subsidies to parents who pay tuition to religious schools. It goes hand in hand with section 2. The benefits for section 3 parents begin at approximately the point where the grants to section 2 parents leave off.[3] As a matter of fact section 3 is so closely bound up with section 2 that the invalidity of section 3 follows from its relationship to section 2. If it is evident that the legislature would not have enacted the part of the statute that is claimed to be within its power independently of that which is not, the statute is wholly invalid, regardless of the inclusion of a separability clause. *Champlin Refining Co.* v. *Corporation Commission*, 286 U.S. 210, 234 (1932). It is obvious that the New York state legislature would not have

[3] The following table shows the estimated net benefits to taxpayers under section 3. The information is taken from the memorandum which accompanied the bill. It was submitted to each legislator by Senator Brydges and was cited by the majority ante p. .

If Adjusted Gross Income is	Income Exclusion Per Pupil is	Estimated Net Benefit to Family		
		One child	Two children	Three or more
less than $ 9,000	$1,000	$50.00	$100.00	$150.00
$ 9,000 - 10,999	850	42.50	85.00	127.50
11,000 - 12,999	700	42.00	84.00	126.00
13,000 - 14,999	550	38.50	77.00	115.50
15,000 - 16,999	400	32.00	64.00	96.00
17,000 - 18,999	250	22.50	45.00	67.50
19,000 - 20,999	150	15.00	30.00	45.00
21,000 - 22,999	125	13.75	27.50	41.25
23,000 - 24,999	100	12.00	24.00	36.00
25,000 and over	0	0	0	0

enacted section 3 benefiting the wealthier parents had they not intended it to be a complement to section 2 benefiting low income parents. Section 3 must therefore fall if section 2 is unconstitutional, as we have held it is.

For the foregoing reasons I respectfully dissent from the determination of the court as to the constitutionality of section 3.

APPENDIX B

Order and Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 2286

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERT ADAMS, BERNARD BACKER, ALGERNON D. BLACK, THEODORE BROOKS, HERSCHEL CHANIN, NAOMI A. COWEN, ROBERT B. ESSEX, FLORENCE FLAST, REBECCA GOLDBLUM, BENJAMIN HAIBLUM, MARTHA LATIES, BLANCHE LEWIS, ELLEN A. MEYER, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, ALBERT SHANKER, HOWARD M. SQUADRON, and CHARLES H. SUMNER,

Plaintiffs,

—against—

EWALD B. NYQUIST, as Commissioner of Education of the State of New York, ARTHUR LEVITT, as Comptroller of the State of New York, and NORMAN GALLMAN, as Commissioner of Taxation and Finance of the State of New York,

Defendants,

—and—

GERALDINE M. BOYLAN, PRISCILLA L. CHERRY, JOAN M. DUCEY, NORA H. FERGUSON, ANGELINA M. FERRARELLA, ERNEST E. ROOS, JR. and ADAMINA RUIZ,

Intervenor-Defendants,

—and—

SENATOR EARL W. BRYDGES, as Majority Leader and President Pro Tem of the New York State Senate,

Intervenor-Defendant.

Order and Judgment

Plaintiffs' motion for the convening of a three-judge District Court pursuant to 28 U.S.C. §§ 2281, 2284 having come on to be heard on June 20, 1972 before the Hon. Murray I. Gurfein, United States District Judge, and the parties having conceded at that time that this action required the convening of a three-judge District Court, and Judge Gurfein having set the matter down for a hearing during the week of July 3, 1972 upon a representation that there were no factual issues involved; and the case having thereafter come on to be heard on the merits on July 6, 1972 before Judge Gurfein, the Hon. Paul R. Hays, United States Circuit Judge, and the Hon. John M. Cannella, United States District Judge, and all parties having submitted briefs and presented oral argument; and the Court, after due deliberation, having concluded on July 21, 1972 that Section 1 of Chapter 414 of the 1972 Laws of New York is in violation of the Establishment Clause of the First Amendment to the United States Constitution, and the Court having set forth the reasons for this decision in an opinion dated October 2, 1972; and the Court having further concluded in its opinion of October 2, 1972 that Section 2 of Chapter 414 is unconstitutional and that Sections 3, 4 and 5 of Chapter 414 are not in violation of the Establishment Clause of the First Amendment, Judge Hays dissenting with respect to Sections 3, 4 and 5 of Chapter 414; and the Court having directed that judgment be entered, permanently enjoining enforcement of Sections 1 and 2 of Chapter 414; and the Court having further stated that the parties may move for summary judgment or for an expedited trial with respect to Section[s] 3 [and 4 and 5] of Chapter 414; and defendants and intervenor-defendants having duly moved for summary

judgment dismissing the complaint with respect to Sections 3, 4 and 5 of Chapter 414;

Now, upon all of the proceedings heretofore had herein, it is hereby

ORDERED, ADJUDGED AND DECREED that Section 1 of Chapter 414 of the 1972 Laws of New York is unconstitutional in that it violates the Establishment Clause of the First Amendment to the United States Constitution; and it is further

ORDERED that the defendants and their agents and all persons acting for or on behalf of the State of New York be, and they hereby are, permanently enjoined from making any payments or disbursements out of State funds pursuant to the provisions of Section 1 of Chapter 414 of the 1972 Laws of New York in payment for or reimbursement of any moneys heretofore or hereafter expended by nonpublic elementary and secondary schools for maintenance and repair; and it is further

ORDERED, ADJUDGED AND DECREED that Section 2 of Chapter 414 of the 1972 Laws of New York is unconstitutional in that it violates the Establishment Clause of the First Amendment to the United States Constitution; and it is further

ORDERED that the defendants and their agents and all persons acting for or on behalf of the State of New York be, and they hereby are, permanently enjoined from making any payments or disbursements out of State funds pursuant to the provisions of Section 2 of Chapter 414 of the 1972 Laws of New York in payment for or reimbursement of

any tuition payments heretofore or hereafter made to non-public elementary and secondary schools; and it is further

ORDERED, ADJUDGED AND DECREED that Sections 3, 4 and 5 of the 1972 Laws of New York do not violate the Establishment Clause of the First Amendment to the United States Constitution; and it is further

ORDERED that defendants' and intervenor-defendants' motion for summary judgment with respect to Sections 3, 4 and 5 of Chapter 414 of the 1972 Laws of New York be, and it hereby is, granted; and it is further

ORDERED that the complaint, insofar as it seeks a permanent injunction against enforcement of Sections 3, 4 and 5 of Chapter 414 of the 1972 Laws of New York, be, and it hereby is, dismissed.

Dated: New York, New York
October 20, 1972

PAUL R. HAYS, *U.S.C.J.*
JOHN M. CANNELLA, *U.S.D.J.*
MURRAY I. GURFEIN, *U.S.D.J.*

ENTERED:

10/20/72 JOHN LIVINGSTON
Clerk

APPENDIX C

Notice of Appeal to the Supreme Court of the United States

(Filed—November 17, 1972)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERT ADAMS, BERNARD BACKER, ALGERNON D. BLACK, THEODORE BROOKS, HERSCHEL CHANIN, NAOMI A. COWEN, ROBERT B. ESSEX, FLORENCE FLAST, REBECCA GOLDBLUM, BENJAMIN HAIBLUM, MARTHA LATIES, BLANCHE LEWIS, ELLEN A. MEYER, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, ALBERT SHANKER, HOWARD M. SQUADRON, and CHARLES H. SUMNER,

Plaintiffs,

against

EWALD B. NYQUIST, as Commissioner of Education of the State of New York, ARTHUR LEVITT, as Comptroller of the State of New York, and NORMAN GALLMAN, as Commissioner of Taxation and Finance of the State of New York,

Defendants,

and

GERALDINE M. BOYLAN, PRISCILLA L. CHERRY, JOAN M. DUCEY, NORA H. FERGUSON, ANGELINA M. FERRARELLA, ERNEST E. ROOS, JR. and ADAMINA RUIZ,

Intervenor-Defendants,

and

SENATOR EARL W. BRYDGES, as Majority Leader and President Pro Tem of the New York State Senate,

Intervenor-Defendant.

Notice of Appeal

SIRS:

Notice is hereby given that Intervenor-Defendant Senator Earl W. Brydges hereby appeals to the Supreme Court of the United States from so much of the Order and Judgment entered in this action on October 20, 1972 as declares that sections 1 and 2 of chapter 414 of the New York Laws of 1972 violate the Establishment Clause of the First Amendment to the Constitution of the United States and permanently enjoins "the defendants and their agents and all persons acting for or on behalf of the State of New York * * * from making any payments or disbursements out of State funds pursuant to the provisions of Section 1 of Chapter 414 of the 1972 Laws of New York in payment for or reimbursement of any moneys heretofore or hereafter expended by nonpublic elementary and secondary schools for maintenance and repair" and also permanently enjoins "the defendants and their agents and all persons acting for or on behalf of the State of New York * * * from making any payments or disbursements out of State funds pursuant to the provisions of Section 2 of Chapter 414 of the 1972 Laws of New York in payment for or in reimbursement of any tuition payments heretofore or hereafter made to nonpublic elementary and secondary schools."

This appeal is taken pursuant to 28 U.S.C. § 1253.

Notice of Appeal

Dated: Albany, New York
November 15, 1972

Yours, etc.

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APPENDIX D

Session Laws of New York

Education—Nonpublic Schools—Aid

CHAPTER 414

An Act to amend the education law, in relation to health, welfare and safety grants for pupils in nonpublic schools; to establish an elementary and secondary education opportunity program of tuition reimbursement for parents of low income; to amend the tax law, in relation to a modification of federal adjusted gross income for parents of nonpublic school children; and to amend the education law, in relation to impacted aid for school districts and the purchase of existing structures to be used for school buildings.

Approved May 22, 1972, effective as provided in section 12.

Passed on message of necessity. See Const. art. IX, § 2(b) (2), and McKinney's Legislative Law § 44.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The education law is hereby amended by adding thereto a new article, to be article twelve, to read as follows:

ARTICLE 12—HEALTH AND SAFETY GRANTS FOR NONPUBLIC SCHOOL CHILDREN

Section

§ 549. Legislative findings

The legislature hereby finds and declares that:

1. The state has a primary responsibility to ensure the health, welfare and safety of children attending both public and nonpublic schools.

2. The state discharges this responsibility to public school children through substantial amounts of per pupil financial assistance to local school districts. The fiscal crisis in nonpublic education, however, has caused a diminution of proper maintenance and repair programs, threatening the health, welfare and safety of nonpublic school children, particularly in urban areas. Such areas are generally identified by a high incidence of families receiving assistance to dependent children and deteriorating physical structures, including nonpublic school buildings. Financial resources necessary to properly maintain and repair such buildings are beyond the capabilities of low-income people whose children attend nonpublic schools.

3. In recognition of the financial plight of urban areas in attracting qualified teachers, the federal government has enacted Title IV of the Higher Education Act of nineteen hundred sixty-five,[1] which provides incentives to teachers to instruct in those schools which serve a high concentration of students from low-income families.

4. It is incumbent upon the state to ensure that the physical environment in such Title IV areas is both healthy and safe. Incidental to such goals, but none the less significant, is the contribution that a healthy and safe school environment makes to the stability of urban neighborhoods.

5. To insure a healthy and safe school environment for children attending nonpublic schools, the state has the right to make grants for maintenance and repair expenditures which are clearly secular, neutral and non-ideological in nature.

[1] 20 U.S.C.A. § 1061 et seq.

§ 550. Definitions

In this article:

1. "Commissioner" shall mean the state commissioner of education.

2. "Qualifying school" shall mean a nonprofit elementary or secondary school in the state of New York, other than a public school, which (a) is providing instruction in accordance with article seventeen and section thirty-two hundred four of this chapter, (b) has not been found to be in violation of Title VI of the Civil Rights Act of nineteen hundred sixty-four, 78 Stat. 252, 42 U.S.C. § 2000(d),[1] (c) which is entitled to a tax exemption under section five hundred one (a) and five hundred one (c) (3) of the Federal Internal Revenue Code of nineteen hundred fifty-four,[2] as amended, and (d) has been designated during the base year as serving a high concentration of pupils from low-income families for purposes of Title IV of the Federal Higher Education Act of nineteen hundred sixty-five (20 U.S.C.A. § 425).

3. "Base year" shall mean the school year immediately preceding the current year.

4. "Current year" shall mean the school year during which an apportionment is to be paid pursuant to this article.

5. "Health, welfare and safety grants" shall mean the apportionment made pursuant to this article which shall be used for the maintenance and repair of nonpublic school facilities and equipment to ensure the health, welfare and safety of enrolled pupils.

6. "Maintenance and repair" shall mean the provision of heat, light, water, ventilation and sanitary facilities; cleaning, janitorial and custodial services; snow removal; necessary upkeep and renovation of buildings, grounds and equipment; fire and accident protection; and such other items as the commissioner may deem necessary to ensure the health, welfare and safety of enrolled pupils.

7. "Average daily attendance" shall mean the total number of attendance days of enrolled pupils in grades one through twelve during the base year, divided by the number of days the school was in session [illegible] year.

§ 551. Apportionment

1. In order to meet proper health, welfare and safety standards in qualifying schools for the benefit of the pupils enrolled therein, there shall be apportioned health, welfare and safety grants by the commissioner to each qualifying school for the school years beginning on and after July first, nineteen hundred seventy-one, an amount equal to the product of thirty dollars multiplied by the average daily attendance of pupils receiving instruction in such school, to be applied for costs of maintenance and repair. Such apportionment shall be increased by ten dollars multiplied by the average daily attendance of pupils receiving instruction in a school building constructed prior to nineteen hundred forty-seven. In no event shall the per pupil annual allowance computed under this section exceed fifty per centum of the average per pupil cost of equivalent maintenance and repair in the public schools of the state on a state-wide basis, as determined by the commissioner, and in no event shall the apportionment to a qualifying school exceed the amount of expenditures for maintenance and repair of such school as reported pursuant to section five hundred fifty-two of this article.

2. The apportionment pursuant to this section shall be reduced by one one hundred eightieth for each day less than one hundred eighty days that such school was actually in total session in the base year, except that the commissioner may disregard such reduction up to five days if he finds that the school was not in session for one hundred eighty days because of extraordinary adverse weather conditions, impairment of heating facilities, insufficiency of water supply, shortage of fuel or the destruction of a school building, and if the commissioner further finds that such school cannot make up such days of instruction during the school year. No such reduction shall be made, however, for any day on which such school was in session for the purpose of administering the regents examinations or the regents scholarship examinations, or any day, not to exceed three days, when such school was not in session because of a conference of teachers called by the principal of the school.

§ 552. Applications, reports, regulations

Each qualifying school which seeks an apportionment pursuant to this article shall submit to the commissioner an application therefor, at such times, in such form and containing such information as the commissioner may by regulation prescribe in order to carry out the purposes of this article. Such applications shall include an audited statement of the expenditures of maintenance and repair of such qualifying school for the base year.

§ 553. Installments

The amount to be apportioned to a qualifying school in any current year shall be paid in two equal installments, the first to be made on or before January fifteenth and the other not later than June fifteenth of such year, except that for the school year commencing July

payment on or before June fifteenth, nineteen hundred seventy-two. The commissioner may provide for later payments for the purpose of adjusting and correcting apportionments. The amount to be apportioned to a qualifying school shall be payable on order and warrant of the comptroller on vouchers certified or approved by the commissioner in the manner provided by law.

§ 2. Such law is hereby amended by inserting therein a new article, to be article twelve-A, to read as follows:

ARTICLE 12-A—ELEMENTARY AND SECONDARY EDUCATION OPPORTUNITY PROGRAM

Section
559. Legislative findings.
560. Short title.
561. Definitions.
562. Tuition reimbursement payments to parents.
563. Commissioner; powers.

§ 559. Legislative findings

The legislature hereby finds and declares that:

1. The vitality of our pluralistic society is, in part, dependent upon the capacity of individual parents to select a school, other than public, for the education of their children. A healthy competitive and diverse alternative to public education is not only desirable but indeed vital to a state and nation that have continually reaffirmed the value of individual differences.

2. The Supreme Court of the United States has recognized and reaffirmed this right of selection. This right, however, is diminished or even denied to children of lower-income families, whose parents, of all groups, have the least options in determining where their children are to be educated.

3. Quality education is made possible for all children in our state only because the burden of providing it has been carried by taxpayers who support both public and nonpublic education. Any precipitous decline in the number of nonpublic school pupils would cause a massive increase in public school enrollment and costs. Such an increase would seriously jeopardize quality education for all children and aggravate an already serious fiscal crisis in public education.

4. In recognition of the initiative of parents who support both public and nonpublic education, it is a legitimate purpose for the state to partially relieve the financial burden of parents who provide a nonpublic education for their children which satisfies the compulsory education laws of the state. Such assistance is clearly secular, neutral and nonideological in nature and is consistent with the historical and continuing role of the state in providing a quality education for all children and in nurturing a pluralistic society.

5. An Elementary and Secondary Education Opportunity Program is established, which consists of tuition reimbursement for par-

the financial burden of supporting the compulsory education of their children who are full-time students in New York nonpublic elementary and secondary schools.

§ 560. Short title

This article shall be known as the "Elementary and Secondary Education Opportunity Program".

§ 561. Definitions

The following terms, whenever used in this article, shall have the following meanings:

a. "Parent" means a legal resident of the state of New York with a New York taxable income of under five thousand dollars who is a parent, stepparent, adoptive parent and the spouse of an adoptive parent of a pupil enrolled in a nonpublic school, or a resident with such taxable income standing in loco parentis to such pupil.

b. "Taxable income" means the amount of combined net taxable income, if any, of both parents computed in accordance with the provisions of section six hundred eleven of the tax law computed without the benefit of the modification of federal adjusted gross income for nonpublic school tuition pursuant to paragraph (14) of subsection (c) of section six hundred twelve of the tax law, for the year for which a tuition reimbursement payment is sought. If the parents of a pupil are living apart, the taxable income of the parent who claims reimbursement under this article shall be based upon the taxable income of that parent with whom the pupil is living, or who exercises custody if the pupil is a minor, or would exercise custody if the applicant were a minor and any appropriate payments for the support of the pupil from the other parent.

c. "Nonpublic school" means any nonprofit elementary or secondary school in the State of New York, other than a public school, which (i) is providing instruction in accordance with article seventeen and section thirty-two hundred four of this chapter, (ii) has not been found to be in violation of Title VI Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. § 2000(d),[1] and (iii) which is entitled to a tax exemption under section five hundred one (a) and five hundred one (c) (3) of the Federal Internal Revenue Code of nineteen hundred fifty-four,[2] as amended.

d. "Tuition" means the amount actually paid by a parent for the enrollment of a pupil at a nonpublic school for the calendar year for which a tuition reimbursement payment is sought.

e. "Pupil" means a resident of the state of New York who has been enrolled full-time in a nonpublic school and whose parents' combined taxable income is less than five thousand dollars.

f. "Commissioner" means the commissioner of education of the State of New York.

g. "Regular school year" means all of the months of the calendar year exclusive of July and August.

[1] 42 U.S.C.A. § 2000(d).

[2] 26 U.S.C.A. (I.R.C.1954) § 501(a), (c)(3).

§ 562. Tuition reimbursement payments to parents

1. Upon the filing by a parent of the verified statement as required by subdivision two, the commissioner shall make a tuition reimbursement payment to such parent for tuition expenses made in the preceding calendar year. Only one such payment shall be made on behalf of any pupil in a calendar year. Such payment shall be the lesser of either (a) fifty percent of the tuition paid by the parent during the preceding calendar year for the elementary or secondary education of each pupil, or (b) five dollars per month for the period of enrollment in a nonpublic school during the regular school year for each pupil in grades one through eight, and ten dollars per month for the period of enrollment in a nonpublic school during the preceding regular school year for each pupil in grades nine through twelve. Whenever payments as herein computed total less than ten dollars, no such payment shall be made.

2. In order to be eligible for tuition reimbursement hereunder, the parent of a pupil shall, by May first of the year following the calendar year for which reimbursement is sought, file with the commissioner a verified statement, in such form as he shall provide, stating that the pupil was enrolled during such year in a nonpublic school or schools and, in addition, the following information: (a) the name, address and taxable income of the parent; (b) the name, address and birth date of the pupil; (c) the grade in which the pupil was enrolled during each month in a nonpublic school in such year; (d) the name and address of the nonpublic school or schools attended by such pupil; (e) a receipted tuition bill. For reimbursement for the calendar year nineteen hundred seventy-one, such verified statement shall be filed not later than July first, nineteen hundred seventy-two.

3. No parent shall be eligible to receive a tuition reimbursement payment who has claimed a modification of federal adjusted gross income for nonpublic school tuition pursuant to paragraph fourteen of subsection (c) of section six hundred twelve of the tax law based upon the same tuition expenditures.

4. The state tax commission shall, when requested by the commissioner, compare any verified statement filed with the commissioner pursuant to this article with the state income tax returns if any, filed by the parent making such verified statement and shall report any discrepancies to the commissioner. All verified statements filed with the commissioner and all reports made to him by the state tax commission, pursuant to this article shall be deemed confidential and, except in accordance with proper judicial order or as otherwise prescribed by law, it shall be unlawful for the commissioner or any officer or employee of the department to divulge or make known in any manner the amount of income or any other particulars set forth in any verified statement filed with him hereunder or report made to him pursuant to this subdivision; but nothing contained herein shall be considered to prohibit the commissioner's publication of statistics so classified as to prevent the identification of particular affidavits or reports.